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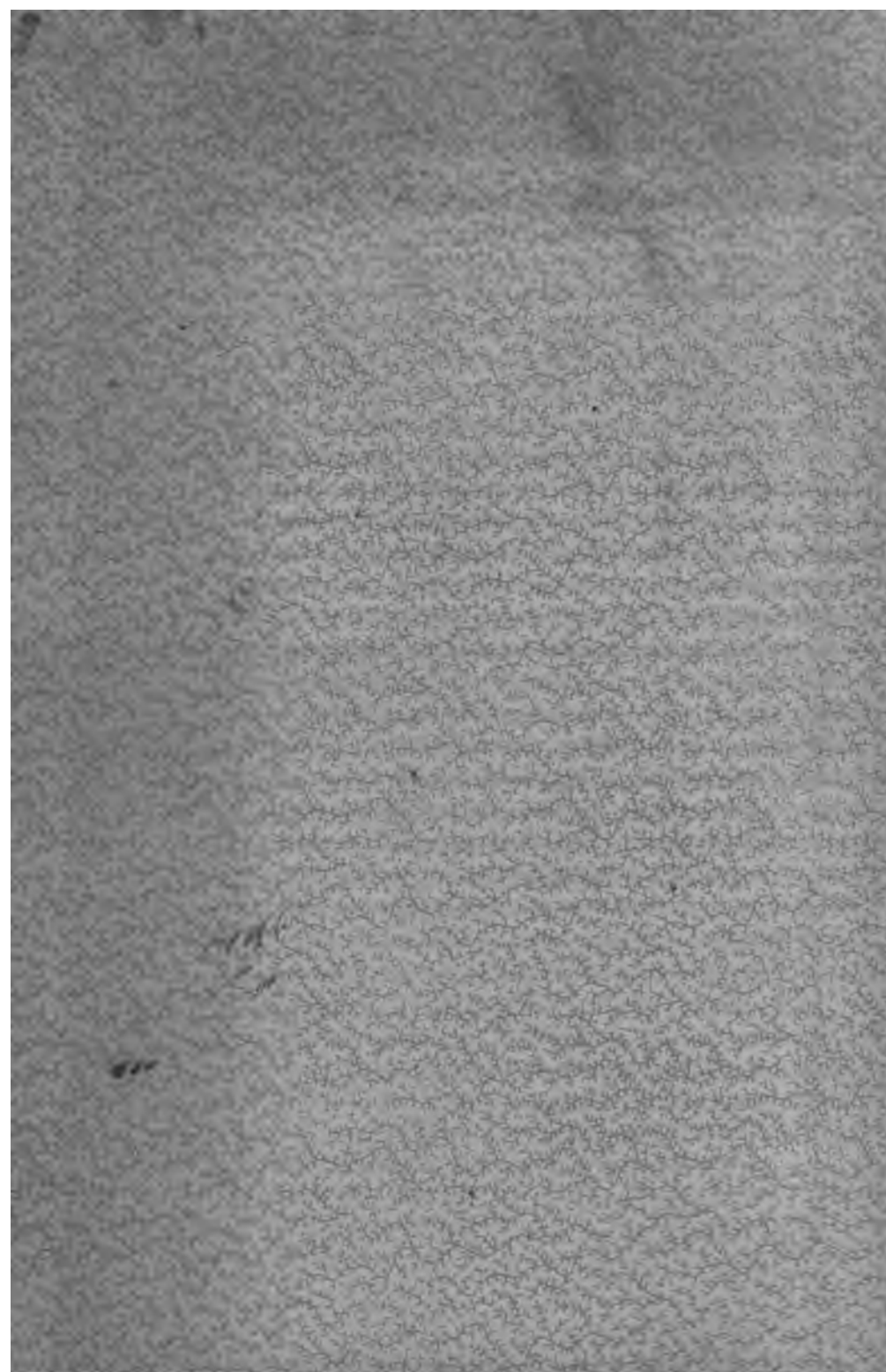
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THE
LAW AND PRACTICE
OF
MARINE INSURANCE,
DEDUCED
FROM A CRITICAL EXAMINATION
OF THE
ADJUDGED CASES,
THE NATURE AND ANALOGIES OF THE SUBJECT,
AND THE
GENERAL USAGE OF COMMERCIAL NATIONS.

BY JOHN DUER, LL. D.
ONE OF THE LATE REVISERS OF THE STATUTE LAWS OF NEW-YORK.

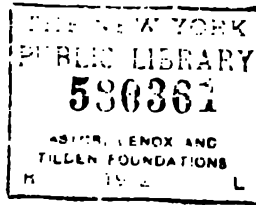
"Legitimæ inquisitionis vera norma est, ut nihil veniat in practicam, cujus non fit etiam doctrina aliqua et theoria."—BACON.

VOL. I.

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TO
THE FOUNDER
OF THE
American School of Commercial and Maritime Law,

WHOSE NAME EACH READER WILL INSTANTLY SUPPLY,

TO HIM,

WHO, BY THE EXAMPLE OF HIS LIFE, AS WELL AS BY HIS LABORS AND HIS WRITINGS,

HAS RAISED THE CHARACTER AND DIGNITY

OF THE

Legal Profession

IN THESE UNITED STATES,

THIS WORK ON MARINE INSURANCE,

THE FRUIT, IN A MEASURE, OF HIS PERSONAL APPROBATION AND ENCOURAGEMENT,

IS NOW INSCRIBED,

BY HIS FRIEND AND DISCIPLE,

THE AUTHOR.

P R E F A C E .

IT was the original intention of the author, to have explained fully, in this Preface, the plan that he has followed, and intends to follow in the ensuing work ; but this intention, his subsequent reflections have induced him to abandon. If he has been fortunate in the choice of his plan, and successful in the mode of its execution, that intelligent portion of the public, for whose use his labors are principally designed, will not be slow to perceive, nor reluctant to admit, their value. And, if he has been unsuccessful, no explanation that he can give, nor vindication that he can offer, can possibly avail, even to suspend, far less to avert, a sentence of just condemnation. That he does not anticipate an unfavorable verdict, the publication of his book sufficiently proves ; but it is upon the evidence that the book contains, without any effort on his part, to explain or demonstrate its value, that a favorable verdict, if given at all, must be founded. The general design of the author has been, to exhibit, so far as his abilities would enable him, that desirable union between the respective methods of the foreign and of the English jurists, in the treatment of juridical subjects, which the lamented Story, in the Preface to his Commentaries on the Law of Bailments, has so forcibly recommended,(a) and in that, and in his subsequent treatises on con-

(a) "There is a remarkable difference in the manner of treating juridical subjects, between the foreign and the English jurists. The former, almost universally, discuss every subject with an elaborate, theoretical fullness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with few exceptions, write Practical Treatises, which contain little more than a collection of the

mercial law, has so admirably exemplified ; but whether this design of the author has been, in any degree, accomplished, must be left to the judgment of his readers.

There is, however, a single topic, on which a few words of explanation may not be unnecessary, and will, at least, be excused. The author has used great freedom in criticizing the decisions of courts, and the opinions of judges and jurists, of the highest authority ; and he is quite aware, that, by a proceeding so unusual to the English writers on law, he has exposed himself to the charges of temerity and presumption. He believes, however, that he has, in no instance, questioned the propriety of a decision, or the soundness of an opinion, without submitting to his readers, the grounds and motives of his dissent ; and if the reasons that he has given, are not lightly advanced, he is firmly persuaded, that to express the dissent they are meant to justify, was a duty, that may be inadequately performed, but could not be declined.

The functions of a writer, who seeks to introduce harmony, order, and system into that division of the law, of which he treats, in their essential nature, are judicial. It is in the spirit, and with the independence of a judge, that they ought to be discharged. His duty, like that of the judge, is to express his own convictions ; to state that which he believes to be the existing law, and to exercise a free and unbiassed judgment, in forming the conclusions, at which he arrives. He is bound to examine, to analyze, and compare the various decisions, from which the law that he undertakes to expound must be chiefly extracted—to

principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are but little more than full Indexes to the Reports, arranged under appropriate heads ; and the materials are often tied together by very slender threads of connexion. They are better adapted for those, to whom the science is familiar, than to instruct others in its elements. It appears to me, that the union of the two plans would be a great improvement in our law treatises, and would afford no inconsiderable assistance to students in mastering the higher branches of their profession." *Story on Bailments*, Pref. xiii.

reconcile them, when they can be reconciled, and, when they cannot, to confess the fact, and then to determine, according to his best judgment, their relative claims to authority. Above all, he must esteem it his paramount duty, to show that the positions that he adopts and seeks to explain, are consonant to the dictates of right reason, and the precepts of a sound morality. Anomalies may, doubtless, be found, that it will not be in his power to remove; and these he must not seek to conceal—far less, by a false logic, to defend or extenuate. Still, his constant effort must be, to exhibit the law as worthy of the reverence that it claims, and to prove, that the obedience it demands is such as the enlightened mind will be prompt to render.

Such are the maxims by which the author has been governed, and he trusts that his work will afford some evidence that he has, at least, endeavored faithfully to observe them. A critical examination of the adjudged cases, and of the opinions of judges and jurists, was a necessary part of the process, by which he has sought to arrive at a knowledge of the truths he was bound to declare. The observations that he has thus been led to make, if such shall be the opinion of competent judges, may be rejected as erroneous; if they are admitted to be just, they are an actual contribution, however small in value, to the science of which he treats. But, whether they shall be admitted or rejected, whether they are just or erroneous, they are, in all instances, such, as the author's own conviction of their truth, and of their relevancy, compelled him to submit.(a)

(a) In treating of the duty of a judge, in the examination of precedents, Chancellor Kent says, that where hasty and crude decisions appear to have been made, "they ought to be examined without fear, and revised without reluctance, rather than to have the character of the law impaired, and the beauty and harmony of the system destroyed, by the perpetuity of error." (1 *Kent's Com.*, 5th ed., p. 496.)

ERRATA.

Introductory Discourse, Lec. I., p. 6, line 6 from bottom, for "Ordinances of other contracts," read "Ordinances of other countries."

P. 14, note, line 3, for "cantum," read "cautum."

P. 15, line 9, for "capitol," read "capital."

P. 25, note, last line, for "jacta," read "jactu."

Introductory Discourse, Lec. II., p. 31, note, line 7, from bottom, for "s'avis," read "s'avis."

Lec. I., p. 136, line 10 from bottom, for "case," read "cases."

Lec. II., Pt. I., p. 232, line 9 from top, for "question," read "questions." Same line, strike out the word "abroad."

Lec. II., Pt. I., p. 231, line 17 from bottom, after word "preliminary," insert the word "proof."

Lec. II., Pt. II., p. 265, line 8 from top, for "or," read "and."

Lec. III., p. 344, line 10 from bottom, for "crime," read "cause."

Lec. IV., p. 413, last line, for "claimnants," read "claimants."

Same, notes, p. 481, line 10 from bottom, for "to, become," read "to become."

Lec. V., p. 520, line 3 from top, for "foreign," read "hostile."

Lec. VIII., p. 742, line 11 from bottom, after the word "distinction," insert the word "which."

This volume having extended beyond the limits it was believed it would require, the intended Appendix containing the forms of policies, and a translation of the Ordinance of Barcelona, is omitted. It will be added to Vol. II., which will be put to press in the month of January next.

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INTRODUCTORY DISCOURSE.

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Definition of Marine Insurance—Not merely a branch of municipal law—Considered by the French jurists and by Blackstone a part of the law of nations—In what sense this assertion is true—How far the laws and usages of other nations are to be received as authority—Remarks on a passage in the preliminary discourse of Mr. Marshall—Inquiry whether Marine Insurance was known to the Ancients—Silence of the Roman law not conclusive—Reply to the arguments of Mr. Park relative to the limited extent of ancient commerce, and the paucity of the risks to which it was exposed—Presumption arising from the prevalence of Bottomry—Passages cited by Emerigon from Livy and Suetonius as historical proof that Insurance was not unknown—His interpretation of these passages vindicated—Conclusion that the Roman government in the cases mentioned was the insurer in the strict sense of the term—Weakness of the objection that no premium was paid—Explanation of the silence of the Roman law—Insurance probably not a branch of general law, but merely a local usage—As such not meant to be superseded—Reasons why the contract of Bottomry regulated by the Digest and Insurance omitted—The Digest not meant to embrace a complete code of maritime law—Many important subjects in respect to which there must have been existing regulations omitted—Reasons that led to the omission may equally apply to Marine Insurance—Probable solution of the difficulty, that subjects omitted were embraced in the Rhodian laws, which were then in force—These laws not extant—Collection published under that name spurious—Conclusion—The reasonable presumption that Insurance was known to the Romans has not hitherto been refuted.

MARINE Insurance is, in few words, a contract of indemnity against the perils of the sea. The party stipulating the indemnity, called the insurer or underwriter, agrees, in consideration of the payment of a certain sum, called a premium, to make good to the party assured, all losses, not exceeding a specified amount, that may happen to the subject insured, during a certain voyage, or period of time, from certain acts or events, denominated perils,

enumerated or implied in the contract. The instrument containing the contract is termed a policy. The origin and meaning of the term I shall hereafter explain.

The law of insurance is not to be regarded merely as a branch or division of municipal law. It boasts a nobler origin, and claims a wider domain. It is the common language of the French jurists that marine insurance is not the creature of positive and arbitrary law; but, in its essential principles and its leading maxims, a component part of the law of nations,—meaning by the law of nations,^(a) not that which defines the rights and duties of nations in their mutual intercourse, but that which is of universal, permanent and paramount obligation, and which not only every nation as such, but each individual of the human race, is bound to obey—the eternal law of truth and justice. In this sense, which is borrowed from the Roman jurists, the law of nations is strictly synonymous with the moral law, or as some modern writers have chosen to term it, the law of nature.^(b)

(a) Pothier *Traité des Assurances*, n. 9. Emerigon, ch. 1. sec. 6.

(b) Sir Jas. Mackintosh has vindicated the propriety of the appellation in one of the noblest passages of English literature: "It is the law of nature, because its general precepts are essentially adapted to promote the happiness of man, as long as he remains a being of the same nature with which he is at present endowed; or, in other words, as long as he continues to be man, in all the variety of times, places, and circumstances, in which he has been known, or can be imagined to exist; because it is discoverable by his natural reason, and suitable to his natural constitution; because its fitness and wisdom are founded on the general nature of human beings, and are altogether independent of any of those temporary and accidental situations in which they may be placed. With still more propriety, and indeed with the highest strictness, and the most perfect accuracy, it is called a law, when, according to those just and magnificent views which philosophy and religion open to us of the government of the world, it is received and revered as the sacred code, promulgated by the great Legislator of the universe, for the guidance of his creatures to happiness; guarded and enforced, as our own experience may inform us, by the penal sanctions of shame, of remorse, of infamy and of misery; and still farther enforced by the reasonable expectation of yet more awful penalties in a future and permanent state of existence."—*Discourse on the Study of the Law of Nature and of Nations*, Bos. ed. 1843, p. 47.

Mr. John Austin, in his admirable work, "The Province of Jurispru-

This explanation of the true character of marine insurance, applies, in a greater or less degree, to other branches of commercial law, and to justify its propriety it is not at all necessary to rely upon foreign authority. The most eminent writers on commercial law, both in England and in the United States, have held substantially the same language, and the doctrine which it implies is sanctioned not only in the reasoning of our judges, but by the decisions of our courts. Nor is this doctrine of recent origin. It is stated by the illustrious commentator on the laws of England in these significant terms :—" The law of nations, (whenever any question arises which is the proper subject of its jurisdiction,) is adopted in its full extent by the common law, and is held to be a part of the law of the land. Thus in mercantile questions, such as bills of exchange and the like—in all marine causes relating to freight, average, demurrage, *insurances*, bottomry, and others of a similar nature, the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too, in all disputes relating to prizes, shipwrecks, hostages and ransom bills, there is no other rule of decision but this universal law."^(a)

In quoting this decisive passage, and in order to prevent a possible misconception of its meaning, it is my duty to remark that the law merchant is certainly not a branch of the law of nations in the same sense as the law of prizes, or the other subjects enumerated by Blackstone in the same connection, and which belong to the law of nations in the usual and proper acceptation of the term. The laws of nations, in its strict and appropriate sense, is just as binding on nations as the laws of a particular state or government, on its citizens or subjects ; and as no individual can discharge himself from the duty of obeying the laws of the community of which

dence Determined"—a book much less known than its merits deserve—while he admits the strict propriety of the terms "natural law and law of nature," yet objects to them as ambiguous, and proposes to substitute "the divine law," and "the law of God." (*Austin on Jurisprudence*, Lond. 1832, sec. 1, p. 2.) The ambiguity to which Mr. Austin refers the reader will find noted and explained in Whately's *Logic*, Append. Verb. Law.

(a) 4 Black. Com., ch. 4, p. 68.

he is a member, whatever he may think of their policy or justice, so a nation cannot by its own act exempt itself from the obligations of that universal moral law, which so far as it applies to independent states in their mutual intercourse and relations, the law of nations is intended to embody and express. No nation can change the rules, which this law prescribes, to suit its own interest or convenience, and if such changes are made by the act of a single power they furnish a just subject of complaint, and in some cases of war, to all other nations, whose rights or interests are affected by the alteration. It is manifest that these observations cannot be applied, with truth, to the law merchant. Every government has a perfect right to make such regulations in respect to its own commerce, and all the transactions and contracts of which commerce is the parent, as in the exercise of its own discretion, it may deem proper. It is not bound to consult the wishes or follow the opinions or practice of other countries, but may govern itself by an exclusive regard to its own views of expediency or justice. It is therefore only in an imperfect sense that the law merchant can be considered a branch of the law of nations. It is so, because from reasons of public policy and motives of general convenience, its adoption is presumed by the government of every country in which there are no positive regulations of a different character: but in every country in which it prevails it is this implied adoption by the government, and not its own intrinsic force, that renders it a part of the law of the land; owing its efficacy not to the general consent of nations, but in each solely to the will, express or implied, of the legislative power, the same will is competent at all times to modify or reject it. The law merchant resembles the law of nations, properly so called, in the sources whence it is chiefly derived, the rules of natural equity and justice, and in its general adoption by civilized powers, but differs from it widely in the nature of the obligation which it imposes, and of the sanction by which it is enforced.

It follows from the positions I have sought to establish, that in investigating the true principles of marine insurance, and in seeking to discover the rules by which particular questions arising

under it are to be determined, we are not restricted to our own statutes, or the decisions of our own tribunals, or of other courts of common law. Our researches to be satisfactory must take a wider range. It is in a larger field, clothed with a brighter atmosphere, (shall I be pardoned for adding ?) that we are privileged to expatiate—" *Largior hic campos æther vestit.*"

The authority of our municipal law, whether expressed in legislative acts or in judicial decisions, is controlling in all the cases to which it applies, but in cases that cannot be thus determined, which are far more numerous than is commonly imagined, the rules of decision must be sought in the principles of an enlightened reason and the general usage of the commercial world, and to aid us in the research, the judgments of foreign tribunals, the provisions of foreign codes, and the writings of foreign jurists, may not only with propriety be consulted, but ought to be carefully examined and diligently studied. Mr. Marshall, in his preliminary discourse to his valuable work on insurance, says that the decisions of foreign tribunals are of no authority in the courts of England, and that he cites them only to show "upon doubtful questions how learned men in other countries understood the principles of that law, which is supposed to be in force in England." If his meaning is that the decisions of foreign tribunals do not possess the *same authority* as the judgments of our own courts,—that they are not evidence of a law which, when declared, all are bound to obey, without inquiring into the reasons on which it is founded, the truth of his remarks cannot be denied, but the mistake, I apprehend, is serious if he is to be understood as meaning (as his language seems to imply) that the judgment of a foreign tribunal, on a new or unsettled question of commercial law, if fairly derived from principles universally acknowledged, and affording reasonable evidence of a general usage, is not binding on the consciences of our judges, and ought not to be respected and followed as a rule of decision. If the law merchant is indeed the law of the land, and if it consist in the general custom of merchants,—that is, in the rules by which merchants not in one port or country, but throughout the great

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family of the nations, which commerce has linked together, are usually governed,—when satisfactory evidence that a particular rule is thus sanctioned is adduced, it ought surely to control the judgment of the court. The assertion of Blackstone, that we have adopted the law merchant in its full extent as the law of the land, cannot be true if in each case that arises, the best evidence that a principle or rule applicable to its decision, is a part of that law, may be disregarded or rejected. A law that we are certainly bound to obey, we are as certainly bound to know, and it can hardly be denied that the necessary knowledge, in cases where our own laws and reports are silent, can be derived with the most advantage and certainty, from the sources I have already mentioned,—the decisions of foreign courts,—the provisions of foreign codes,—and the opinions and reasoning of foreign jurists. From these sources, therefore, it is my intention in these Lectures to draw freely and largely,—not for the mere purpose of illustration and comparison, but with the practical object of ascertaining the existing state of our own law; and, if I mistake not, a clear and steady light, guiding us to safe conclusions, may thus be thrown on many perplexed and doubtful questions, yet undecided, in our own courts, and unsettled in the practice of merchants and insurers.

Before I close these prefatory remarks, it is due to Mr. Marshall to say, that his error in the passage on which I have commented, consists only in his language. The terms he has used are too general, but it is clear from other passages in his preliminary discourse, (an essay of singular ability and learning,) that they are not to be understood in their unqualified extent of meaning. In speaking of foreign ordinances he has stated the true distinction, with clearness and precision. (1 *Marshall Prelim. Dis.*, p. 20.) “The ordinances of other ~~countries~~,” he says, “are not, it is true, *in force* in England, but they are of *authority*, “at least, as expressing the usage of *other countries*, upon a “contract which is presumed to be governed by general rules “that are understood to constitute a branch of public law.” It is manifest that no real difference can exist in respect to their

authority between foreign ordinances and foreign judgments, and it would be unreasonable to suppose that Mr. Marshall meant to be otherwise understood. It would be absurd to admit the authority of a law and deny that of its judicial interpretation by the tribunals of the country in which it prevails,—or to affirm that evidence of a usage is not as clearly to be deduced from the one as the other. The ordinance and the decision stand on the same ground. Both are evidence of a law: In the one case enacted, in the other declared; and in both cases, the existence of a usage in correspondence with the law, may be presumed. Neither is *in force*. Both are of authority. Neither claims our implicit submission. Both, when they convince the reason oblige the conscience. *Valent ratione, non jure*.

I shall now proceed to the proper subjects of this Introductory Lecture, in which I propose to discuss some questions of interest connected with the origin and progress of marine insurance, to give some account of the sources whence the law of insurance, as it now exists, is chiefly derived, and to conclude with a brief statement of the advantages that have resulted to society from the prevalence of the usage.

Whether marine insurance, as practised in modern times, was known to the ancients, is a problem that yet remains to be solved. It is a litigated and doubtful question. Probable reasoning would seem to dictate an affirmative reply; yet, when we consider the extent of the remains that have reached us from antiquity, the entire absence of direct and positive proof, is an objection not easily surmounted,—and perhaps this negative argument outweighs the intrinsic probability. It is admitted by all that the contracts of bottomry and respondentia,—the loan of money on a vessel or cargo, to be repaid only in the event of its safe arrival, in which the lender therefore is plainly an insurer to the extent of his advance,—were well known and extensively used. The titles “*de nautico fœnore*” and “*de usuris*,” which embrace these contracts, are among the most ample and instructive in the Roman law, yet nowhere in the great body of the civil law, neither in the Institute, Pandects, Code or Novels, nor in any of the laws

of the emperors who succeeded Justinian, is any trace to be found of the existence of insurance as a distinct and independent contract. Hence many eminent scholars and jurists have arrived at the conclusion, that of insurance, in the proper sense of the term, not merely of the name, but of the contract itself, the Romans were wholly ignorant; and in this conclusion, Mr. Park, in the introduction to his work on insurance, and Mr. Marshall, in his preliminary discourse, have expressed their entire concurrence. That the silence of the Roman law is an *argument* of great weight I have already intimated, and it were idle to deny.^(a) That it is entirely conclusive may perhaps be reasonably doubted. It has occurred to me that a discussion of the whole question, a dis-

(a) The silence of the Roman law is not entire, if according to the interpretation that Emerigon has given to certain texts, wager policies were not unknown. "Cetté especè d'assurance, n'étoit pas inconnue aux Romains. Si un tel navire arrive d'Asie je vous donnerai telle somme, si navis ex Asiâ venerit, L. 63, ff de verb oblig : si'l n'arrive pas, vous me donnerez telle somme, dare spondes si navis non venit, L. 129, ff. eod." (Emerigon, ch. 1, sec. 1.) Why Emerigon should suppose this to be a mere wager, I do not understand. If the person paying the smaller sum in case of the arrival of the ship was the actual owner, the contract was a *valued* policy, covering however only the single risk of a total loss. There is another passage in the Digest in which this species of contract is recognized, and as it is selected as an illustration, it seems a fair inference that in practice it was not unfrequent. *Conditio vero efficax est quæ in constituenda obligatione inseritur, veluti centum dare spondes nisi navis ex Asia venisset?* Dig. Lib. xlv. Tit. vii. Lex. xlv. These passages, if the contracts to which they refer were *not* wagers, afford positive evidence that insurance, in a limited and imperfect form, was known to the Romans; and admitting the contracts to have been wagers: If insurance was practised in the form of a wager, it adds great force to the presumption, that it was also known as a contract of indemnity. Judging from the experience of modern Europe, it even seems probable that the legitimate use of the contract preceded the abuse. Mr. Marshall says, that "there is in the Pandects an observation of Ulpian which affords greater color for supposing that marine insurance was not altogether unknown to the Romans, than any other authorities that have been cited. Ulpian puts the question, "Illa stipulatio decem millia salva fore promittis?" and replies "valet." But it is evident from the context of the law, (Dig. Lib. xlv. L. 67,) that the stipulation of which Ulpian speaks, had no relation to marine risks, but was simply the guaranty of a debt. (Marsh. Pre. Dis. p. 8.)

cussion somewhat fuller than it has yet received, may not be uninteresting.

When we call to mind how extensive and flourishing was the commerce of many of the ancient cities and states, to select a few, of Tyre, Carthage; Corinth, Athens, Rhodes, Alexandria,—it seems highly improbable that a contract of such easy invention as marine insurance, and of such utility, that it seems almost necessary to the existence of an extended commerce, was wholly unknown; and this improbability is strengthened by the fact that, in modern times, the introduction of insurance was almost coeval with the revival of commerce; and this, in an age when the cloud of ignorance, the darkness visible, that had so long brooded over Europe, had scarcely begun to be dispelled, and the beams of knowledge and civilization were yet struggling in the mists of a doubtful twilight—That, judging from the ordinary motives of human action, insurance is the certain product, or necessary adjunct of an extended commerce, Mr. Park distinctly admits; but he contends that the boasted commerce of the ancients was, in truth, no more than an inconsiderable coasting trade, and was so conducted as, in a great measure to exempt it even from the ordinary perils of navigation, so that both, from its limited extent, and the paucity of the risks to which it was exposed it never required the protection which insurance is meant to afford. For these observations of this learned writer, I find it difficult to account. They will, certainly, excite the surprise of all who may happen to have directed their attention to the subject. Applied to the infancy of commerce, they contain a portion of truth, but, applied to its actual state for more than a thousand years prior to the disruption of the Roman Empire, the errors that they involve are grave and undeniable. Admitting that the voyages of the ancients were merely coasting voyages, it by no means follows, that, for that reason, they were exempt from hazard. The truth it is generally understood, is directly the reverse. It is to an opposite conclusion that the fact should lead us. It is remarked by the learned Heeren, in his General Introduction to his masterly work on the politics, intercourse and trade of certain nations of antiquity, that

the boldest and most skilful sailors are usually formed by coasting voyages, because (such are the reasons he assigns) this species of navigation is more *difficult and dangerous* than any other ; and it is the contest with difficulties and dangers that prompts invention and trains to hardihood. He appeals to the experience of England in proof of the justice of his remark, and our own experience in our coasting trade and fisheries, I am well assured, confirms its truth. It is, however, certain that the voyages of the ancients, within the limits of the Mediterranean, were not always coasting voyages, nor in the latter days of the Roman Republic and under the Empire, was such their usual character. We have the evidence of the elder Pliny(a) that in his own age, the voyages from Italy to Spain, Africa, Egypt, Syria and Greece, were made by the most direct route. They were not performed by stealing timidly and circuitously along the inlets and bays of the coast, but by stretching directly and boldly across the expanse of the ocean. It is obvious that in voyages thus performed, the imperfect structure of the vessels, and the ignorance of the mariners,—their ignorance of the modern arts and instruments of navigation, (topics on which Mr. Park has strongly dwelt,) as they greatly enhanced the perils of the sea, tended also to enhance, and consequently to suggest, the importance and value of the security that insurance alone provides. Upon the whole, we have the strongest reasons to believe that the disasters of navigation in ancient times, so far from being few and insignificant, were more frequent and ruinous than in our own, and from this cause, it doubtless happens, that the dangers

(a) Pliny (Hist. Nat. Lib. xix. Præmium) in a somewhat rhetorical enumeration of the uses and virtues of flax (linum) says, "Sed in qua non occurret vitæ parte, quodve miraculum majus, herbam esse, quæ admoveat Ægyptum Italiæ, in tantum ut Galerius a freto Siciliæ Alexandriam, septimo die pervenerit, Babilius sexta : æstate vero proxima, Valerius Marianus nono die lenissimo flatu : herbam esse, quæ a Gadiis ab Herculis columnis septimo die Ostiam afferat, et citeriorem Hispaniam quarto, provinciam Narbonensem tertio, Africam altero." The distance from Sicily to Alexandria is about one thousand miles. The voyage could not, therefore, have been performed in six or even nine days by any other than a direct route.

of the ocean, (as is well known to those who are familiar with classic writers,) appeared to the imagination of the ancients in forms of terror that, to our experience, seem unreal or extravagant.

The error of Mr. Park, as to the extent of ancient commerce, is, at least, as extraordinary as his inverted estimate of its perils. That it was less extensive than the whole present commerce of the civilized world, may be readily conceded. That it was more so than the whole commerce of Europe until a recent period of its history, may be regarded as certain. I select, for comparison, a definite period. When we reflect on the vast extent of the Roman dominion under the empire, that it embraced, during a period of nearly five hundred years, all Italy, Spain, France, England, large provinces in Austria and Germany, Sicily, Greece, the isles of the Mediterranean, the whole of the Turkish Empire in Europe and Asia, and the rich and flourishing provinces of Africa and Egypt! When we call to mind the character and wants of the immense population, by which most of these countries were inhabited,—the height of civilization and wealth, to which most of the nations had attained,—the number, extent and riches of their maritime cities,—the variety and perfection of their arts,—the multiplied luxuries in which they indulged,—the artificial desires of every kind that civilization and wealth create,—luxury and the arts combine to stimulate, and commerce provides the means of satisfying; and when we add the numerous and intimate relations between their inhabitants, which the union of these countries under one government must have created, and the unexampled facilities of intercourse, which that union tended to promote and secure, it seems impossible to doubt that the commerce of the empire vastly exceeded, in amount and value, that of all Europe until (I am within bounds in saying) the close of the seventeenth century, when, for at least three hundred years marine insurance had been known, and was, probably, in general use. The conclusion, to which the general considerations I have stated lead us, seems to be confirmed by the evidence of history. We are assured by the elder Pliny, that the annual profits of the commerce of Egypt alone, amounted to a sum which, reduced to

our own currency, exceeds one hundred and thirty millions of dollars.(a) That is, a sum exceeding the annual value of the whole exports of the United States. This estimate, at the first view, may seem too extravagant for belief; but we must remember, that the commerce of Egypt was by no means confined to the exports of its own commodities, and the supply of its own inhabitants. The rich productions and fabrics of the East, of Arabia, Persia and India, imported into Egypt by the Red Sea, and transported by camels across the desert, were poured from Alexandria into the capacious bosom of the capital of the empire. The commerce of Egypt was, therefore, certainly a very large, and, not improbably, the most important and lucrative portion of that of the empire. It is said by Mr. Park, and the assertion is repeated by Marshall, that the commerce of the ancients was almost, if not wholly, confined to the Mediterranean, the Egæan, and the Euxine Seas. The commerce of the Red Sea, of the Persian Gulf, and of the Indian Ocean, seems to have escaped their recollection. The boldest and most extensive voyage of the ancients was performed by the fleets,(b) (frequently consisting of more than a hundred vessels,) that sailed annually from a port of the Red Sea, or a cape of Eastern Africa, to the coast of Malabar and the island of Ceylon. In this voyage they did not creep along the coast from port to port, but launched fearlessly into the bosom of the ocean, which, by the periodical aid of the monsoons, was traversed, speaking generally, with safety in the course of about forty days. Such was the extent of this Indian traffic—such the value of the

(a) I state this on the authority of Mr. Beawes, (*Lex Mercat. Introd.* p. 5,) but must confess that I have searched in vain in the voluminous compilation of Pliny for the passage to which he refers. It is indeed stated by Pliny that the annual profits on the trade of Alexandria with India, which were at the rate of one hundred to one on the capital employed, amounted to a sum which in modern currency would be equal to about twenty-four millions sterling, and it is not improbable that this is the passage Mr. Beawes had in view. (*Pliny, Lib. v. cap. 22.*)

(b) Strabo, Lib. 17; Pl. His. Nat. Lib. 4, c. 22; Lib. 12, c. 18; Gib. Dec. and Fall, vol. 1, ch. 2; Macpherson's Annals of Commerce, vol. 1, p. 56.

commodities these fleets imported, that Pliny seems to have feared, that the circulating medium, the gold and silver of the empire, would be exhausted in the purchase of eastern luxuries. "So vast are the sums," he somewhat cynically adds, "that our pleasures and our women cost us." "*Tanto nobis deliciæ fœminæque constant.*"(a)

I have said enough on these topics—the timid navigation and scanty commerce of the ancients. But there are other considerations—I shall state them briefly—that deserve our attention. The extensive use of bottomry among the Romans, is, alone, sufficient to disprove the singular notion that ancient navigation was exempt from hazard. But for the hazards of navigation this contract could not have existed, and had not the perils, against which it provides, been known to be frequent and serious, the high rate of interest commonly allowed, could never have been exacted. The prevalence of bottomry is, in itself, a strong argument in favor of the supposition, that insurance in its simpler form was known and practised. The desire of merchants of limited means to obtain the necessary capital for enterprises, in which they wished to embark, combined with the desire of protecting themselves against the loss of the capital employed, led to the invention and practice of maritime loans, in which the lender assumes the risks of the voyage. It is evident, that the same desire of providing an adequate indemnity against the perils of the sea, must have existed in cases in which no advance of capital, as a loan, was needed or desired; that is, in cases, judging from our own experience, forming a vast majority of commercial adventures. That, to persons thus situated, to minds actuated by this desire, the utility of an insurance unconnected with a loan, should not have occurred, it is difficult to believe, and still more so, that appreciating its utility, they neglected its introduction and use. Let it be admitted, that the contract of bottomry was first in the order of invention; reasoning from probability, we should say that the

(a) Pliny, Lib. xii. c. 18. See, also, Tacit. Annal. Lib. 3, c. 53, where Tiberius makes a similar complaint to the Senate.

separation in a distinct contract, of the insurance from the loan was an immediate and almost a necessary consequence. For myself, I am persuaded, that were we wholly ignorant of the laws of the Romans, but knew from history, the extent of their commerce, we should deem it far more probable, that marine insurance was in frequent and general use, than loans on bottomry and respondentia; for these plain reasons, that the contract of insurance is simpler in its provisions, less onerous in its terms, more easy to be effected, and of far wider utility.

The judicious Emerigon, in the preface to his learned and accurate work on insurance and maritime loans, asserts that traces of marine insurance are to be found in Roman history, and he cites two passages from Livy, and one from Suetonius, in proof of his assertion. If I do not deceive myself, the passages he has cited, fortify, to some extent, the presumptions on which I have insisted. It is indeed said, by the able writers, to whose observations I am attempting to reply, that Emerigon has strangely misapplied the passages he has quoted, and that properly understood, they have no relation to insurance; but to the justice of the criticism I am unable to assent. An attentive examination has constrained me to believe that this eminently cautious writer was not mistaken in the import or bearing of the authorities on which he relied. As it appears to me, they more than substantiate the truth of his assertion, and exhibit, not merely traces of insurance, but the contract itself, in an unusual, it is true, yet in a perfect form.(a)

(a) Emerigon also quotes and relies on the following passage from a letter of Cicero, "*Laodiceæ me prædes accepturum arbitror omnis pecuniæ publicæ, ut et mihi et populo captum sit sine vecturæ periculo.*" (*Epis. ad. Fam.* 2. 17.) But I agree with Mr. Marshall, that the probable meaning of Cicero was, that he would deposit the money at Laodicea, and there take security for its being paid at Rome without any risk to himself or to the republic, and hence that the intended contract bears a much stronger affinity to the practice of remitting money by means of bills of exchange than to that of insurance. Indeed, the words of Cicero do not necessarily import that the money was to be paid at Rome at all. The contemplated security may have been for its repayment at Laodicea.

If a controversy can be settled by a bold assertion, that, we are consider-

It appears from Livy, that on two occasions, during the republic, the government at Rome, for the encouragement of the merchants, who had contracted to supply its armies abroad, with munitions of war, provisions and other commodities, agreed to bear all losses that might happen to the cargoes, during the voyage, from hostile capture or the perils of the sea, and the evidence of Suetonius is, that at a later period, and during a season of apprehended scarcity at Rome, the Emperor Claudius encouraged the importation of corn for the use of the capital, by promising to those who should engage in the traffic a similar indemnity.^(a) The observations of Mr. Park on these transactions, are, that they bear no resemblance to the contract of insurance, since the promise of the Roman government imports no more "than every well regulated state is bound to do, by the ties of natural justice." "It is equitable and just, (he adds,) that those who appropriate their wealth to the public use, should be reimbursed from the purse of the state, for the private losses they may sustain. Such, indeed, is the rule of conduct between man and man—for when one man purchases goods of another, to be sent abroad, was it ever supposed that the seller was to be at the risk of the voyage, or that if the goods perished, he was never to be paid?" It is evident, that the learned writer assumes in these remarks, that the Roman government became the purchaser of the commodities to be transported before they were embarked, and consequently, was to be the actual owner during the voyage. Upon this supposition, the truth of his observations cannot be denied. Upon any other, their application is not easy to be discerned.

If the contract of purchase was future in its character, and was not to be complete until the delivery of the cargoes at their

ing, has been terminated by Boucher. He says, (*Droit. Mar.* ch. 29, § 1250,) "Il est faux que ce soit les Juifs, comme le pretend Giovan Vilani, et après lui Cleirac et autres auteurs, qui soient les inventeurs du contrat d'assurance, puisque les Romains l'ont connu et pratiqué." And he then refers to the letter of Cicero, as indubitable evidence of the fact.

(a) Liv. L. 23, c. 49; L. 25, c. 3. Sueton. Lib. 5, c. 2.

destined ports, the Roman government was not bound by any rules, either of positive law or natural equity to sustain the losses that might attend the transportation.(a) The rule in every system of law with which I am acquainted, is directly the reverse, and that rule is founded on the clearest reason: The plain design of the parties in every such contract, is to cast the risks of the voyage upon the seller. Even when the purchaser of goods, to be delivered by the seller, at a foreign port, agrees also to assume the risks of the voyage, the added agreement does not change the property. The seller still remains the owner until delivery, and the purchaser is, during the voyage, his insurer, in the proper and in the legal sense of the term. I remark then, in reply to the observations of Mr. Park, that his supposition that the government was to be the owner when the voyages commenced, is more than gratuitous. It is not consistent either with the language of the historian, (I speak now of the cases under the republic,) or with the facts, which his narrative records.

We are told by Livy, in reference to the first transaction, that the merchants required the guaranty of the government against the perils they apprehended, as an express condition of their contract. Now, it seems evident, that if, under the contract, the government was to be the owner of the cargoes, when laden, it would never have occurred to the merchants that the condition

(a) It is evident from the narrative of Livy, that this was the nature of the contract. The public treasury was exhausted, and it was promised to those who, upon the credit of the republic, would engage to furnish and transport the necessary supplies, that they should be paid out of the first monies that should thereafter come into the treasury, "*Conducerent ea lege ut quum pecunia in ærario esset, iis primis solveretur.*" It is therefore certain that the delivery in Spain was to precede, and consequently was a condition of, the payment. The Prætor had given public notice that on a certain day he would receive proposals for the contract on these terms, and on the day appointed, (the narrative proceeds,) "*ad conducendum tres societates aderant hominum undeviginti, quorum duo postulata fuere, unum ut militia vacarent, dum in eo publico essent, alterum, ut quæ in naves imposuissent, ab hostium tempestatisque vi publico periculo essent.* Utroque impetrato, conduxerunt, privataque pecunia respublica administrata est."

they demanded was necessary or proper. The plain object of their demand, was to make the government responsible for losses, to which, otherwise it would not have been liable. Had the government been the owner, a special agreement that it should sustain the losses resulting either from hostile force or the perils of the sea, would have been useless and unmeaning. It would be so under our law. It would have been so under the Roman. Under that law, neither the owner or master of a vessel was ever responsible for losses occasioned by a superior force, or inevitable accident.^(a) The circumstances mentioned by Livy, in connection with the second transaction, place its real character beyond the reach of a reasonable doubt. He states that some of the merchants, to whom an indemnity had been promised, endeavored to defraud the government, by fabricated accounts of shipwrecks and losses that had never occurred; and his meaning evidently is, that for these pretended losses they sought to obtain, under their special agreement with the government, a compensation in money. It is plain, that to such a compensation, even had the losses been real, it was only in their capacity of owners, that they could be entitled. As to the passage from Suetonius, it scarcely requires a remark. Its meaning is clear and unambiguous. It does not appear that the Emperor Claudius was to purchase the corn at all. It was to be imported into the general market of Rome, for general sale to its inhabitants, and the encouragement held forth by the emperor to the merchants was, an indemnity, if the corn should be lost on the voyage, and a fixed

(a) The edict of the Prætor (*Dig. Lib. iv. tit. 9.*) declares the owner of the vessel to be liable for the safe transportation of all goods received by the master, and from its general terms it might be inferred that this liability was universal and absolute, but it is expressly stated by Ulpian, in his comment on the edict, that losses resulting from inevitable accident, as from shipwreck or piracy, were construed to be excepted, "At hoc edicto omnimodo, qui recepit tenetur, etiam si sine culpa ejus res perierit, aut damnum datum est, nisi si quid *damno fatali* accidit: inde Labeo scribit, "si quid *nanfragio* aut per vim piratarum perierit non esse iniquum exceptionem ei dari." (*Dig. ut. sup. lex. 3.*)

bounty in case of its arrival. *Negotiatoribus certa lucra proposuit, suscepto in se damno, si cui quid per tempestates accidisset.*

Upon the whole, the conclusion seems hardly to be doubtful, that, on the occasions mentioned by Livy and Suetonius, the merchants were the owners of the cargoes to be transported, and in each case were to continue so during the voyage, and until its termination. The government, therefore, in each case and in the strict and proper sense of the term, was the insurer of the merchant. It assumed on itself the whole risks of each voyage, in consideration of the benefit the public would derive from its successful completion. The objection that no premium was paid, (a) seems hypercritical, and is easily answered. The government received a premium in the benefit resulting to the public, and the merchants paid a premium in a reduction from the price they would otherwise have received. Had the risks of the voyage been cast upon the merchants, the value of the risks, as computed by them, would doubtless have been added to the price they demanded. When goods are transported by sea, insurance, whether a premium be paid or not, or, in other words, a just compensation for the risks incurred, is always a component part of a remunerating price, just as freight is a component part of the same price, even when the owner of the cargo is also owner of the vessel. It is true that the historical facts adduced by Emerigon, while they prove an insurance by the government, are not sufficient to prove that marine insurance was known as a private contract: but, as they clearly show the reluctance of merchants to embark their property in voyages of hazard, without the assurance of an indemnity, they render it probable that, when tempted by the expectation of high profits, they engaged in similar voyages, in which the govern-

(a) The objection, that no premium was paid was first made by Kuricke. (*Diatrib. de Assecur.* p. 829.) It is repeated by Millar, and adopted by Mr. Park, (*Introd. p. 16, note.*) but the reply of Emerigon, which in substance is that given in the text, seems to have escaped their notice. (1 *Emerigon*, ch. 3, sec. 11.) The passages from Livy and Suetonius were first adduced and relied upon as proof. "Hunc contractum (assecuracionis sc.) veteribus non planè ignotum fuisse," by Loccenius. (*Lib. 2, ch. 5, n. 2.*)

ment had no interest, it was in a contract with individuals that they were accustomed to seek the desired indemnity. The quotations of Emerigon, it thus appears, more than support the position for which he cited them. They have a *direct* bearing on the general question, and tend by a reasonable inference to establish the fact, that the contract of insurance, as now understood, was in actual use. It is quite incredible that it was, only in the cases mentioned by history, that the desire to be protected by insurance was felt, and almost equally so, that the guaranty of the government was the only security—the only means of indemnity ever sought to be obtained.

The grand difficulty of the argument yet remains to be encountered—the entire omission of the subject of insurance in the Roman law—a difficulty much strengthened by the fact that the analogous contract of bottomry is fully and carefully treated. I shall not dissemble the extent of the difficulty, nor deny that, on the first consideration of the subject, the inference seemed to me unavoidable and necessary, that insurance was omitted because it was unknown. It did not then occur to me that any other explanation of the fact could be given. Subsequent reflection and research have led me to a different conclusion. The argument founded on the silence of the Roman law, proceeds on the supposition that the Justinian Code, (I use the term in its largest sense, as comprehending the whole body of the civil law,) was intended to embrace all laws of a permanent character, that from the time of its promulgation, were to be in force throughout the empire, and to constitute the rules of decision in all its tribunals. That such was the general design of the work cannot be doubted, but, that it was meant to supersede all local laws and usages whatever on subjects not embraced in the code, or not in actual conflict with its provisions, it would be unreasonable to suppose, and for such a supposition, there is not that I am aware, the slightest authority.(a) Now, if marine insurance was known in the time

(a) We have, indeed, express evidence that local laws relating to commerce, were not in all cases meant to be superseded. The *Novellæ* con-

of Justinian, its knowledge and use were probably confined to the maritime cities of the empire, and it existed in each, not by virtue of any positive law, but as a local usage. It was a custom of merchants, and it was either by the merchants themselves, or by local tribunals, that all questions arising under it were probably determined. Such was the form in which insurance arose in modern Europe. Merchants were its sole inventors. The custom of merchants supplied the rules by which it was governed, and, for a long period, all its controversies were exclusively decided, either by the arbitration of merchants, or by tribunals specially established for their use. It was not a subject of positive law, nor within the jurisdiction of the ordinary courts of justice. It is highly probable that a similar state of things existed under the empire; and if so, the omission of insurance, in a compilation of its general laws, is readily explained. The contract and the law of insurance were unknown to the tribunals and magistrates, by whom the general laws of the empire were administered, and must have been equally unknown to the jurisconsults at Rome, from whose writings the laws of Justinian were principally extracted.

It may be thought that this reasoning, however specious, is effectually refuted by the fact, that the contract of bottomry, and the laws by which it is defined and regulated, were recognized and adopted by Justinian. Bottomry, it may be said, is as truly a mercantile usage, of the existence and provisions of which, it might be presumed that the tribunals and lawyers of Rome were ignorant, as marine insurance. The same causes whatever they were, that led them to the knowledge of the one, must have led

tain a distinct recognition of the validity of local usages on the subject of marine interest. (Nov. 106.) It is true that, by a subsequent law, (Nov. 110,) all these usages are abolished, and all persons prohibited from taking more than 12 per cent., the rate before limited by the general law; but this prohibition strengthens the argument. If an express prohibition was deemed necessary to abolish local usages, differing from a law, general in its original terms, it could never have been supposed that such usages were abolished by the mere omission of the subjects to which they related.

them to the knowledge of the other: nor can it be denied that the law of insurance was just as proper to be inserted in a body of general laws, as the regulations of maritime loans. The conclusions are, that, had such a law existed, it would have been known—if known, it would have been adopted. It is in these objections that the weight of the opposite argument consists. That they have much apparent force cannot be denied. Yet, a reply, not unsatisfactory, may perhaps be given. The reply will be satisfactory, should it appear that the facts, that maritime loans were familiar to the knowledge of the Roman jurists, and a favorite object of their regulation and study, may be explained by reasons that are not at all applicable to marine insurance.

It is well known to scholars, that the patricians and senators of Rome, in the latter days of the republic, and its nobles under the empire, from causes that history too clearly explains, were, in an eminent sense, the capitalists of the world, and that the usual and favorite mode, in which they employed and sought to augment their riches, was in loans at a high rate of interest—loans, not confined to the capital, but freely extended to the provinces.(a) It is for voyages of more than ordinary importance,

(a) The letters of Cicero, when he was Proconsul in Cilicia, contain some curious details relative to loans in his province made by Pompey and by Brutus. (*Epist. ad Attic. Lib. iv. c. i. ii. iii.*) The means by which an agent of the latter, previous to the arrival of Cicero, had sought to enforce the payment of a debt due to his principal from the isle of Cyprus, were somewhat extraordinary. He had shut up the whole senate of the island in their own senate house, and to compel them to accede to his demands, had kept them so long imprisoned that five of their number were starved to death. "*Inclusum in curia senatum Salamine obsederat, ut fame quinque morerentur.*" What is still more astonishing is, that Brutus seems to have approved and justified the conduct of his agent. The rate of interest which the agent demanded was "*quarternæ centesimæ*;" but Cicero seems to have compelled him to accept *centesimæ*, that is, twelve per cent. per annum instead of forty-eight!

The practice of lending money on bottomry at very high rates of interest, seems to have prevailed at Rome from an early period. It is said by Plutarch, that Cato the elder, in his old age, when avarice had become his dominant passion, adopted this mode of increasing his revenues. I give the passage in the antiquated but expressive French of Amyot. "Mais a

that loans on bottomry are commonly needed, and it is the advance of a large sum that is usually required. Such loans, the merchants desirous to borrow, would, very often, find it difficult to effect in the cities of their residence, and we may affirm, without hazard, that it was in Rome itself, the great money market of the empire, that they were usually sought and obtained: hence the tribunals of Rome necessarily acquired jurisdiction of the subject—hence the learning and sagacity of the Roman jurists, themselves belonging to the class by which the loans were made, were soon employed to define and regulate the interesting contract—a contract not liable to the attain of usury—such were the early decisions—whatever might be the rate of interest it secured. It is not surprising that this contract became a favorite at Rome, nor that the regulations concerning it, framed with the most attentive care, were incorporated in the labors of Justinian. But although it is probable that maritime loans were usually obtained at Rome, it by no means follows, that a resort to Rome was necessary, where the only aid required was that of insurance. If insurance was practised at all, it was probably effected, in ancient as in modern times, either by the mutual guaranty of associated merchants, or by a division of the burthen among several individuals, each becoming responsible for a moderate proportion of

“la fin il devint un peu trop aspre et trop ardent á acquerir et abandonna le labourage disant que l’agriculture estoit de plus grand delectation que de grand profit. Parquoy a fin que son argent fust mieux asseuree et de plus grand, et plus certain revenu il se mit á achítér des lacs et des estangs, &c. Davantage il presta son argent a usure et encore a usure maritime qui est la plus reprovée et la plus blasmee de toutes pource qu’ elle est la plus excessive.” (Vie de Cato le Censeur. Amyot, p. 485, ed. 1583.) The first limitation of the rate of interest on maritime loans which, in the language of Gibbon, “the wiser ancients had not attempted to define,” was made by Justinian: it was fixed in the code at twelve per cent. (*Code, Lib. 10, tit. 22, 23; Gib. Dec. and Fall, vol. 5, p. 362.*) This, considering the shortness of the voyages, gave what we should now consider an exorbitant premium in addition to ordinary interest. It is as much as is now usually charged on an East India voyage, out and home.

the sum insured, and hence, the merchant, as a general rule, would effect it without difficulty, in the place of his residence. Thus, it may well have happened, that marine insurance, retaining its original form of a mercantile usage, continued a stranger to the laws of Rome, while maritime loans were first adopted, and then protected and cherished by the same laws, with more than ordinary affection and care.

It is not then a necessary conclusion from the silence of the Roman law, that marine insurance was unknown. Even should the explanation of that silence I have now given be deemed inadequate, another still remains, by which that inference appears to be conclusively repelled. It is susceptible, it seems to me, of the clearest proof, that the framers of the Justinian Code did not intend to include in their labors all maritime laws that were then in force, and insurance may, therefore, have been omitted precisely from the same causes that led to the exclusion of other branches of commercial law. It is true that other maritime laws, than those relating to maritime loans, are found under various titles in several books, both of the Pandects and of the Code, distinctively so called; yet, when these laws are collated and examined, it is seen, that they are, comparatively speaking, few in number and rather supplementary than original in their general character. Some are enacted with a sole view to the interests and convenience of the government—some are exclusively penal, and, in some, the existence of other regulations on the same subject, which do not appear, is clearly implied. Taken collectively, they do not bear even a distant resemblance to the character of a code intended to embrace all the known and proper subjects of maritime law. Laws of the clearest importance and widest utility—regulations that seem essential to the very subsistence of navigation and commerce, are not to be found. There are no laws, for example, defining and prescribing the relative rights and duties of owners, masters, and mariners; none for the regulation of freight, and of the wages of seamen. The conclusion, that no such laws existed is so improbable and violent,

that few will hesitate to reject it as manifestly false. The same conclusion, in respect to insurance, may be just as groundless.(a)

A difficulty still remains that may arrest and suspend our decision. The very statement I have made suggests an inquiry that demands a reply. How shall we account for this exclusion from the Justinian code of the most appropriate and most important subjects of maritime law? How can we reconcile it with the known plan and intentions of its framers? or with the course that, in relation to other subjects, they constantly observed? I shall not seek to evade these questions. If I mistake not, Justinian has himself replied to them, and it is in the Pandects that we shall find the solution we desire. When Trebonian and his associates, under the auspices and orders of Justinian, commenced their labors, an ample code of maritime laws, probably embracing all the subjects which they omitted, was not only in existence, but was in actual force as *law* throughout the empire, and had been so for a series of ages. Those who have directed their attention to the subject, will at once understand, that I refer to the laws of Rhodes, framed in the age of her commercial grandeur, when she claimed and possessed the dominion of the seas, and long and justly celebrated, (if we receive the testimony of Cicero and other ancient writers,) for their accuracy, equity and wisdom.(b) It is uncertain whether the authority of these laws was admitted and followed by the tribunals of Rome, under the republic, but that they were adopted by an early decision of Augustus, and declared a part of the law of the empire, is an established and undoubted fact. In a subsequent age, the decision of Augustus was confirmed and renewed by Antoninus Pius. The edict of this emperor, a rescript in

(a) All the laws on the subject will be found in the following books and titles. Dig. Lib. 4, tit. 9; Lib. 14, tit. 1, 2; Lib. 22, tit. De nautico fœnore; Lib. 47, tit. 5—9; Code, Lib. 4, tit. 25—33; Lib. 5, tit. 62; Lib. 11, the whole book; Novel 106—110. The reader who has not the means or leisure to verify the statement of the text by consulting the original laws, may satisfy himself by examining the abstract of Azuni, vol. 1, ch. 4, art. 3, 5.

(b) Strabo, Lib. xiv. Cicero pro lege Manilia.

answer to a case submitted for his decision, is very different in its form from our modern laws; but as it is exceedingly brief, and a good specimen of the style in which the Masters of the world were accustomed to address their subjects, your patience, I am sure, will not be wearied by its recital. I translate it in these words: "The earth is subject to my dominion. The seas to that of the law. Let the case be determined by the Rhodian law, on naval affairs, the provisions of which I direct to be observed in future, in all cases where they are not repugnant to the laws of Rome. The same decision was formerly made by the divine Augustus."^(a) We have now reached the evidence of which I spoke. This edict of Antoninus is republished by Justinian. It is inserted in the Pandects, and no other reason for the insertion, I apprehend, can be given, than the intention to confirm its authority. Justinian then, following the example of his predecessors, adopts the Rhodian laws, and directs them to be observed in all cases, not provided for in his own, and hence it is, that on most of the subjects, and those the most important, which these laws must have embraced, his own are silent. To have re-enacted the Rhodian laws by a special adoption of each provision, would have been a waste of time and diligence. They were already collected and published in an ap-

(a) Dig. Lib. xiv. Tit. 2, l. 9. The original law is an extract in Greek from the celebrated Jurisconsult Volusius Mecianus, and as he flourished under Antoninus Pius, there can be no doubt of the authenticity of the edict. The following is the Latin translation:

"Domine Imperator Antonine, naufragium in Italiæ facientes, direpti sumus a publicanis Cyclades Insulas habitantibus. Respondit Antoninus Eudæmoni. Ego quidem mundi Dominus, lex autem maris: lege id Rhodia, quæ de rebus nauticis præscripta est, judicetur, quatenus nulla nostrarum legum adversatur. Hoc idem Divus quoque Augustus judicavit." The translation in the text is by no means literal, but it corresponds with the interpretation that jurists have generally given to this law. Azuni says, "the celebrated Cujas maintains, that in all maritime questions the Romans ought to adhere to the laws of Rhodes, if there is no particular law existing to the contrary, and this in conformity with the directions of Augustus expressed in the 9th Law of the Digest, *ad Leg. Rho. de jactu*," which is the law above cited. Azuni *Mar. Law*, vol. 1, p. 271-2.

propriate form; as to them, the labor of selection and arrangement so imperatively required, in other branches of the Roman law, was unnecessary. It had been already performed, and the laws as they stood, were its result. To secure their future observance, nothing more was necessary than to proclaim again their authority. It is then to the Rhodian laws, that we should direct our researches. It is there that we should seek for evidence of the existence of insurance, since it now appears, that if any positive regulations of the contract existed, it is in the Rhodian, not in the Justinian code, that we might reasonably expect to find them. It unfortunately happens that the necessary examination cannot now be made. The *genuine* laws of Rhodes are no longer extant. It is true that certain laws denominated Rhodian, have been published in modern times, and have been illustrated by learned annotations and laborious commentaries, but the laws thus published, are, not only imperfect and confused; their authenticity is more than doubtful. Bynkershoeck, Heineccius, and Emerigon, condemn and reject them; and the resistless logic of Azuni, in an express dissertation on the subject, has fixed, indelibly, the marks of forgery on the entire collection.^(a)

Here, then, on this topic, our inquiries and speculations cease. Whether marine insurance was known to the ancients, must still remain a question of mere probability. That it can ever be decided by positive evidence, we have little reason to expect. In supporting the affirmative of this question, it is a *presumption* only that I have sought to establish. I have meant only to affirm, and have endeavoured to prove, that this presumption is fair, reasonable and consistent, and that its force is scarcely weakened,

(a) These spurious laws were first published at Basle in 1561, afterwards at Frankfort in 1596, with a commentary by Leunclavius. There is an English translation in the work entitled "A General Treatise of the Dominion of the Sea, and a Complete Body of Sea Laws," respecting which the reader should consult a note of the learned and accurate translator of Azuni. (*Johnson's Azuni*, 1 vol. p. 286, n.) The dissertation of Azuni is contained in the 2d article of his 11th chapter. (1 *Emerig.*, *Pref.*, p. 2, 3.)

far less is it annulled by the hostile arguments that have been arrayed against it.

The topics that remain to be considered—the origin and progress of insurance in modern Europe—the sources whence the law of insurance, as it now exists, is chiefly derived, and the public benefits that have flowed from the introduction of the usage—will form the subjects of a succeeding Lecture.

INTRODUCTORY DISCOURSE.

CONTENTS.

Origin of insurance in modern times—Invention due to Italy—Probably came into use at the close of the 12th, or beginning of the 13th century—Explanation of the term “Polizza”—Historical evidence as to the origin of insurance—Character of the Florentine historian, Giovanni Villani—His account of the discovery of insurance—Its probable truth vindicated—Introduction of insurance into other countries of Europe—Tradition of its introduction into England by the Lombards—No certain inference to be drawn from acts of express legislation—Preamble to the act of parliament, 43 Elizabeth—Observations on foreign ordinances—Ordinance of Barcelona, 1435—Preamble—Conclusion that insurance became general throughout Europe within the century that followed its invention in Italy—Principal sources of the law of insurance as it now exists—Il Consolato del Mare—Its age and merits—Laws of Oleron—Dispute as to their origin—Observations on their character and scope—Laws of Wisbuy—Their character and scope—Allude to insurance—Laws of the Hansetowns—Reasons why they contain no mention of insurance—Ordinance of Barcelona, 1484—Ordinances of Florence, Antwerp, Spain, Genoa, Middleburgh, Rotterdam, Amsterdam, Cowningsburgh, Hamburgh, and Stockholm—Ordinance of Louis XIV.—Its character and value—Code de commerce—Second principal source of insurance law—treatises and essays—Le Guidon de la Mer—Santerna, Straccha—Roccus, &c.—Pothier—Valin and Emerigon—Benecki—Malynes *Lex Mercatoria*—System of Mr. Park—Mr. Marshall’s treatise—Benecke on Indemnity—Treatise of Phillips—Compendium of insurance law in Kent’s Commentaries—Judicial decisions in England and in the United States the most abundant source of insurance law—Remarks on the American decisions—Public benefits of the practice of insurance—Eulogy on the contract.

THE origin of insurance in modern times is by no means involved in the same difficulties, as its existence in ancient. Of the time and place of its origin, no certain evidence remains, but that the invention is due to Italy, and that it came into use at the close of the 12th, or the beginning of the 13th century, cannot reasonably be doubted. Were other evidence wanting, its

Italian origin is sufficiently attested, by the fact that the name of the written instrument containing the contract in the other languages of Europe, is clearly derived from the Italian. In other languages, this use of the term employed, is arbitrary and technical. The Italian alone explains its meaning and propriety. The word "Polizza," in Italian, signifies any note or memorandum in writing, creating, or evidence of a legal obligation; and hence the name is applied, with the same propriety, to a bill of exchange, a promissory note, and even to a receipt for money as to the written agreement of insurance. It seems a safe conclusion that insurance originated in the country, the language of which, has given to the agreement of the parties its distinctive appellation.

The lights of Etymology, it has been truly remarked, often illustrate facts that history has left obscure. But on the present occasion we are not reduced to invoke their aid. The fact of the origin of insurance in Italy, about the period that has been stated, is proved by the clearest historical evidence, the testimony of a writer of unquestioned veracity, and who was himself nearly contemporary with the events that he describes. Although nearly two centuries have elapsed since this testimony was first adduced by an eminent French jurist, it has, by subsequent writers, been generally overlooked or disregarded; and the question, that it settled, has continued to be debated, as still doubtful and uncertain.

Giovanni Villani is the most justly celebrated of the early Florentine historians. The learned and eloquent Sismondi, in his recent history of the Italian Republics, adopts him as his guide in a large portion of his narrative, and in terms of unusual force, commends his fidelity, and extols his genius. The exact period of his birth is unknown; but as he died at an advanced age in 1348, it probably occurred between the years 1270 and 1280. He was actively engaged in the business of life—was prominent as a statesman in many of the leading transactions of his time, and from

(a) Sismondi—*Hist. des Rep. Italiennes*, vol. 3, p. 186.

the confidence reposed in his talents and integrity, was elevated in succession to the highest offices in his native republic. It remains only to mention as giving a peculiar force to his testimony, that for a considerable portion of his life, he was largely embarked in mercantile pursuits, so that his knowledge of the usages of commerce was intimate and personal. It is upon the authority of this historian that Cleirac, the French jurist, to whom I referred, founds his assertion, that insurance was invented by the Jews, who, when expelled from France, by Philip Augustus, in the year 1182, found a refuge in Italy: that they resorted to this expedient to secure themselves from the losses attending the transportation of their property and effects from the country in which they were proscribed, and that the merchants of the north of Italy who witnessed the success of the device, struck with its utility, were prompt to adopt and extend its use. (a) It is said by a modern author that this narrative has very little the air of probability, and with this brief remark he dismisses and rejects it (b); but in what its improbability consists, I confess my inability to discover. The sagacity of the Jews, in matters of finance is well known, and they were placed in circumstances of difficulty and distress that were well calculated to sharpen their invention. That they would resort to some expedient for averting or diminishing the losses to which they were exposed, we may

(a) "Les polices d'assurance, et les lettres de change, furent méconnues à l'ancienne jurisprudence Romaine, et sont de l'invention posthume des Juifs, suivant la remarque de Giovan Villani en son histoire universelle."

Pour retirer leur meubles, leur merchandise, et leur autres effects toujours à la Juifues et aux risques et perils de ceux qui leur rendoient ce bon office. La mefiance leur suggera l'invention de quelque rude commencement des brevets, ou polices d'assurance, par lesquelles toutes les risques et dangers du voyage tomboit sur ceux qui les avoient assurees, moyennant un present ou prix moderé qu'on nomme à present *primeur*, ou la *prime* de sorte que les lettres de change et les polices d'assurance sont juifues de naissance de mesme invention et nomination *Polizza di Cambio*, *Polizza di Sicuranza*. Les Italiens, Lombards, Spectateurs, et Ministres de cette intrigue Juifue, en retindrent le formulaire, et s'en sçeurent du depuis bien servir. Cleirac. Le Guidon, Art. 1. note. Us et Cout, &c. p. 182—3.

(b) Marsh. Prel. Dis., p. 4.

certainly believe, and the expedients of insurance and bills of exchange which they are said to have invented, at the same time, were admirably suited to accomplish their object. That the narrative of Villani exhibits the tradition and belief of his own age we cannot doubt, and it is difficult to admit the supposition that the tradition of an event comparatively so recent—a tradition of little more than three generations, could have been materially erroneous: yet even on the supposition that it was wholly groundless, the testimony of Villani is still conclusive to show, not only that insurance was practiced when he wrote, but that it had already existed for so long a period that no certain account of the date or authors of the invention could be given. It must then have existed for more than half a century prior to his own birth, as within a shorter period, the memory of its actual origin could not have been wholly lost. It follows that the commencement of the practice of insurance in Italy cannot upon any hypothesis be referred to a later date than the beginning of the 13th century, nor are there many facts in history not attested by evidence strictly contemporary, that rest upon proofs more direct and certain.(a)

(a) A modern and a very ingenious French writer, Alauzet, adopts another, and, it must be confessed, an exceedingly plausible hypothesis. He attributes the origin of insurance to a decree of Pope Gregory IX., which was first promulgated in 1234, and which declared that “*naviganti vel eunti ad Nundinas certam mutuans pecuniæ quantitatem pro eo quod suscipit in se periculum, recepturus aliquid ultra sortem, usurarius est censendus.*” Although some grammatical doubts were at first raised as to the true interpretation of this decree, it was soon understood and admitted to be a total prohibition of loans on bottomry and respondentia as usurious; and it was for the purpose of evading this prohibition, by separating the assumption of the risks from the loan of the money, that the contract of insurance was invented. It was “*le dernier moyen dont ou s’avisâ pour legitimer le contrat malgré l’Eglise.*” Alauzet supports his opinion by the quotation of several passages from the early writers—Santerna and Straccha—and they give to it, it cannot be denied, an air of great probability. It is, however, attended with serious difficulties. If the decree of Gregory IX. gave rise to the invention of insurance, as a distinct contract, the fact must, from its nature, have been quite notorious, and of its existence Villani could not have been ignorant; and if the de-

The exact period of the introduction of insurance into the several countries of Europe, is far more uncertain than that of its

cree had been regarded as an authoritative interdiction by the church, of maritime loans, how happens it that the practice of such loans, if ever discontinued, was so soon revived and became universal? They are expressly authorized by the laws of Wisbuy and the ordinance of Barcelona; and their legality now is, and for centuries past has been, admitted in every country of Europe, subject to the Papal sway, although there is no evidence that the decree of Gregory has ever been modified or revoked. How happens it that the papal interdiction, if justly interpreted, has proved so emphatically a "*brutum fulmen*!" We are told by Alauzet that soon after the publication of the decree, it was insisted by some doctors, whether of the church or of the law, he does not say, that its true reading was "*usurarius non est censendus*." The significant word *non* having been omitted by mistake in the publication, and they contended, and very plausibly contended, that the text of the residue of the decree, and especially of the passage immediately following that which has been quoted, rendered it evident that, that which they adopted was the true and necessary interpretation. Alauzet, indeed, rejects their opinion; but in the usage of nations it has evidently prevailed, and seems to have prevailed from a very early period. (Alauzet *Traite Gen. des Assur.*, Tom. 1, ch. 2, p. 48 a 63.)

Another modern French writer, the author of a very valuable and practical treatise on insurance, Le Monnier, gives the same account of the origin of the contract as Alauzet; and he informs us that the hypothesis was first broached by Vilagut, a doctor of the canon law, in a Latin treatise, "*de usuris*," published at Venice in 1589. (*Commentaire sur les principales polices d'assurance maritime usitees en France*. Paris, 1843. Tome 1, Pref. p. 43—48.)

I add some other authorities that show the prevalence of Marine Insurance at a much earlier period than English writers have been disposed to admit. Pardessus, in the first volume of his invaluable "*Collection des Lois Maritimes*," cites a Flemish writer to prove that the count of Flanders, at the request of the merchants of Bruges, established a tribunal for the trial of insurance cases (*une chambre d'assurance*,) in that city in 1310; and Pegolotti, an Italian writer, to whom both Alauzet (Tom. 1, ch. 3, p. 34,) and Le Monnier refer, (Tom. 1, pref. p. 39,) states that the usage was well established at Florence at the same period, and even that brokers were usually employed to effect the policies. Pegolotti wrote in 1330. It is said by Le Monnier that in the next volume (the 6th) of his collection, M. Pardessus intends to publish an ordinance on the subject of insurance, bearing date in 1318, and recently discovered at Cagliari, and which he truly says "*est le premier monument qui atteste l'usage de ce contrat*," that is the first evidence of *legislation* on the subject. Upon the whole, I adhere to the conclusions in the text, that insurance had its origin at the close of the 12th, or the beginning of the 13th century.

origin in Italy. In the age when the discovery was made, and in the century following, the merchants of Italy were the carriers of Europe; and numbers of them, under the well known name of Lombards, were established as merchants and bankers in its principal cities. It is probable that by them the knowledge of a discovery so useful and important was speedily and generally diffused. We know from history that a colony of Lombards was settled in London in the 13th century, and conducted for a long time almost exclusively the foreign trade of the kingdom; and it is to them that the tradition of England attributes the introduction of insurance. The fact is universally allowed—nor does it rest solely on the general consent of writers and the authority of tradition—but is in a measure confirmed by a clause that is found in the oldest English policies; and, if I mistake not, is even retained in those of the present day.^(a) It is not credible, that while insurance was practised by the Lombards in England, their brethren in the cities of the continent were ignorant of its existence or rejected its use. It appears a safe conclusion that insurance became general about the close of the 13th century.

Some writers, rejecting all traditional accounts and probable evidence, are disposed to deduce the existence of insurance in every country, solely from acts of express legislation; but that no certain inference can be drawn from these sources, is evident from the fact that in many countries, probably in all, insurance existed in the usage of merchants for a long and indefinite period before it was made an object of positive law.

Thus, in England, the first act of parliament that mentions insurance, was passed in the 43rd year of the reign of Elizabeth, (1601.) The object of this act is to create a special tribunal for the determination of insurance cases, or more properly to confirm and extend the authority of one that the merchants of London

(a) It is retained in the London policy of the private underwriters, as given in the last edition of Park, (1842,) and is in these words, "It is agreed by us the insurers, that this policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street," &c.

had already established for the same purpose. That insurance had its origin in the provisions of this statute, or that it was a practice of recent introduction, which parliament was in haste to regulate, cannot be pretended. Not only do the provisions of the law recognize the usage as already established, but its preamble recites that it had prevailed in England among all its merchants, both native and foreign, from time immemorial—expressions that strongly confirm the uniform tradition of its introduction by the Lombards.

Nor is the statute of Elizabeth the only evidence that insurance existed for a long time as a mercantile usage before it attracted the notice of the legislative power. The early foreign ordinances that treat of insurance, when carefully examined, lead, without exception, to the same conclusion—none of them profess to create or authorize insurance; not one of them attempts to define or give effect to it as a contract before unknown—on the contrary, in all of them the validity of the contract is assumed, and the usage recognized as subsisting and general. Indeed, had not the usage become general, and the cases arising under it of frequent occurrence, it is not probable that any of these ordinances would have been framed. Their object is to correct abuses, and supply defects that no legislative wisdom could anticipate, and a long experience could alone have disclosed. The very existence on such a subject of a special ordinance is evidence of an anterior usage of an indefinite duration—indefinite where history has not supplied the means of fixing its origin.

That insurance was introduced into the maritime cities of Spain at a period much earlier than into the rest of Europe, has never been asserted or supposed; yet the earliest foreign ordinances on the subject are those of Barcelona, of which the oldest, we now know, was enacted in 1436.(a) The preamble of this

(a) There are four of these ordinances, bearing date respectively in 1436, 1458, 1461, 1484. A translation in Spanish of all of them, made from the originals in Catalan, in the records of the city of Barcelona, is appended by Capmany to his edition of the *Consolado* and other maritime laws of Spain, a work of great value, to which neither the English nor

ordinance refers to certain provisions in the existing ordinances relative to marine insurance, which the *lapse of time* and *other* circumstances had shown to be defective and inexpedient; and the ordinance then proceeds to amend the errors that were thus discovered. (a)

That the practice of insurance had existed in Barcelona for at least a century prior to the ordinance, after reading this preamble, we can scarcely doubt. It must have existed there as elsewhere for a considerable time in the form in which it was introduced, as a custom of merchants; and after it was made a subject of positive law, a still longer period must have elapsed before the regu-

French writers seem to have referred. It is entitled, "Codigo de las costumbres maritimas de Barcelona hasta aqui vulgarmente llamado Libro del Consulado &c. Par Don Antonio de Capmany, &c., Madrid, 1791. When I speak of the silence of the English writers, I mean the writers on law. The work of Capmany is frequently referred to by Mr. Hallam in his History of the Middle Ages. The ordinance of 1484 was intended to be a complete code of the law of marine insurances. It repeals all prior ordinances, and directs that from the time of its publication its provisions shall alone be in force. It was appended to the first printed editions of the Consolato, and to all the early translations; and hence became a principal source of insurance law throughout southern Europe. (Vide post, Lec. I., note 3.) It is not contained in the collection of Magens; nor am I aware that any translation in English has hitherto been published. I have endeavored to supply this defect by the translation which will be found in the appendix to this volume. The translation is made from the Spanish of Capmany, which differs in many respects from the French of Boucher, and the Italian of Casaregis. The Ordinance of 1484, Mr. Marshall erroneously supposes to have been first published in 1435, and he says that it recites that "whereas in times past but few Ordinances of insurance had been made, this defect requires amendment," &c. How wide this is from the true meaning of the preamble, the reader will see in consulting the appendix. The Spanish of Capmany is "*diversas Ordenanzas*," the Italian of Casaregis, "*piu Ordinanze*." (Marsh Pre. Dis. p. 20.)

(a) "Como las ordenanzas hechas para los seguros maritimas y mercantiles que se hacen en Barcelona sobre generos y mercaderias de vasallos del Señor Rey, y se cargan en navios ó fustas de extrangeros, prohiben que ninguna persona pueda asegurar en ellos sino la mitad del coste; y atendiendo al tiempo que corre y á otros respectos, no son practicables en provecho de la cansa pública, antes necesitan de coreccion y enmienda." Capmany Ap. p. 69.

lations concerning it could have required amendment from their mere antiquity. The result of this brief examination is, that the foreign ordinances, as well as the statute of Elizabeth, are entirely consistent with the relation of Villani, and justify the probable conclusion that the practice of insurance became general throughout Europe within a century from the date of the invention in Italy.

The law of insurance as it now exists, is chiefly derived from the following sources. First: Ancient and Modern Codes of Commercial Law. Secondly: Elementary and practical treatises on the same subject in our own and foreign languages: and lastly, the reports of the decisions in the courts of common law in England and in this country. Some observations on each of these heads are necessary to complete the design of these introductory remarks.

According to the general opinion, the most ancient collection of maritime laws now extant is the famous "*Il Consolato del Mare*,"^(a) adopting its Italian, and perhaps its original name. No translation of this venerable Code has yet appeared in our language, but it has been repeatedly published in Italian, Spanish, French, and German. The best editions are those in Italian which are illustrated by the commentaries of Casaregis, an eminent jurist of Genoa.^(b) The *Consolato* is a collection of consi-

(a) This is the opinion of Valin, of Emerigon, of Azuni, and generally of the jurists who preceded them, but it is denied by M. Pardessus, who in his "*Collection des Lois Maritimes*," has published several statutes and ordinances, which he contends are of much earlier origin. Such as a maritime statute of Trani, entitled "*Ordo et Consuetudo Maris*," enacted in 1063, a similar statute of Pisa, in 1160, and the "*Capitulare nauticum*" of Venice, revised and corrected, 1256, but enacted at a much earlier period. But admitting these local ordinances to be more ancient than the *Consolato*, they have always been so obscure and so little known, that they cannot be regarded as sources of the commercial law of Europe.

(b) The most accurate edition as to the text is undoubtedly that of Capmany, and his Spanish the best translation. It is the Commentary of Casaregis that alone gives to the Italian its superior value. Capmany says that the old Italian translation which Casaregis has adopted without

derable extent, probably embracing all the maritime laws which were known in Europe at the time of its completion, and its provisions on many subjects, particularly in relation to freight and general average, and the duties of masters and mariners are copious and instructive. Whatever theory we may adopt as to its origin, whether with Grotius and Emerigon and other learned jurists, we ascribe it to the ancient kings of Arragon, or convinced by the fervid and patriotic logic of Azuni, attribute the exclusive glory to his favorite Pisa, it seems to be certain that the collection was completed and in force as early as the 11th century and that during a succession of the ages that followed it was received and obeyed as law by all the nations of Southern Europe. Indeed, unless a change has recently occurred, the rules of the Consolato have still the force of law in the tribunals of Italy and, I believe, of Spain. The tree under which the nations of Europe once reposed, after the lapse of eight centuries, is still undecaying and majestic. Its branches, though curtailed in their proportions, still spread in luxuriance and vigor, and the trunk, though its exterior is rugged from age, is solid within.(a)

attempting to correct, is disfigured by defects and mistakes, monstrous and innumerable.

There is an old French translation of the Consolato, by Meyssoni, which Valin censures as written in very bad French, and almost unintelligible. There is also a modern translation which professes to have been made from the original Catalan edition of 1494, by P. B. Boucher. Professeur de Droit commercial, Paris, 1808. It is to this translation as the best known and most accessible, that I shall generally refer.

(a) Capmany, in his preface, seems to have proved that the Consolato, in the form in which it now exists, was compiled at Barcelona, in the Romance or Catalan language, probably between the years 1258 and 1266; and it is certain that the first printed edition, that of 1494, was in Catalan, and from a Catalan manuscript. Capmany, however, admits that the laws and usages of which the compilation was framed, were already and generally in force in the cities and ports of the Mediterranean. In support of the claims of Pisa, Azuni has clearly shown that an entire code of maritime laws was framed at Pisa as early as the 11th century; and his arguments render it highly probable that the Pisan code was the basis of the Barcelonian, and furnished its chief and most valuable materials. The preface to the Consolato, which professes to state the exact

It is hardly necessary to say that the Consolato contains no mention of insurance. We have already seen that the discovery belongs to a later age.(a)

The next maritime laws in the order of time, are the laws or judgments of Oleron, an island on the coast of France, within the jurisdiction of the ancient province of Guienne. It is a national controversy whether these laws properly belong to England or France. The learned Selden, who is followed by Blackstone,(b) and other English authors, asserts that they were first published in their present form by king Richard I. on his return from the Holy Land, and were intended to have the force of law in his English as well as in his French dominions. But the French jurists are unanimous in repelling these assertions as a manifest attempt to rob France of the glory to which she has an exclusive claim. They insist that these laws were first compiled under the authority of Queen Eleanor the mother of Richard I. and were published by her at her favorite isle of Oleron in her character of Duchess of Guienne, and were framed for the sole use of the French provinces that formed her paternal inheritance.(c) The learned and sagacious Macpherson, the author of the *Annals of Commerce*, who, as a Scotsman, was probably impartial, rejects both the English and French hypothesis as not only destitute of historical proof, but as inconsistent with facts that history records. He affirms that

time that it was adopted in succession by the different nations of the Levant, although implicitly followed by Valin and Emerigon, is now wholly discredited. It is shown, both by Capmany and by Azuni, to be full of very gross chronological errors. Azuni, *Mar. Law*, vol. 1, ch. iv. art. 8, p. 326—372.

(a) It contains evidence, however, that a contract, which was a species of mutual insurance, was in frequent use—an agreement between the owners of the ship and of the goods, that all losses should be borne proportionally, according to the value of their respective interests. In other words, that all losses should be a general average. Vide Alauzet *Trait. Gen.*, Tom. 1, ch. 1, p. 40—45.

(b) Selden *de dom. Mar.* c. 24. Blackstone, *B. iv. ch. 33*, p. 423.

(c) Cleirac, *Pref.* p. 2. Valin, *Pref.* p. xi. The latter says, somewhat uncourteously, that the views of Selden “sont autant de chimeres.” Emerigon, *Pref.* 11.

the oldest manuscript of these laws bears the date of 1266, more than half a century after the deaths of Queen Eleanor and her son, and that there is no evidence of their publication at an earlier period. On these litigated questions I shall hazard no opinion but shall only say that at whatever time, and by whatever authority, the laws of Oleron were first published, their internal evidence compels me to believe that they were intended to apply exclusively to French vessels and French navigation.

On the character of the laws themselves, I shall speak with an entire freedom. That they contain some just and salutary regulations, is doubtless true; but, considered as a whole, that learned jurists, and enlightened scholars, have deemed them worthy of their approbation and praise, excites my unfeigned surprise. Taken collectively they bear most evident traces of the rudeness and barbarism of the age in which they were compiled. Many provisions violate the plainest rules of natural justice: some by their positive absurdity provoke our mirth, and some by their atrocity excite and merit our detestation. I shall extract a single regulation in which all the qualities I have noticed are happily combined. It is at once unjust, absurd, and merciless. It declares that where a vessel in charge of a pilot, is lost by his negligence or unskilfulness, he shall be answerable for all the damages that may happen to the owner or merchant; and so far, there is no ground for censure; but if the pilot is unable to satisfy the loss, the law then declares that without suit, inquiry, or delay, he shall be instantly beheaded, and that no master, merchant, or mariner assisting in the execution shall be liable to punishment. It however concludes with the wise and humane caution, that the decisive measure of taking off the head is not to be adopted, unless it is quite certain that the wretched pilot has not the means of payment; if he can satisfy the loss, his crime is forgiven, but if he is wholly destitute, he has no claim to mercy.

It is not necessary to adduce any further specimens of the equity and wisdom of the laws of Oleron. The entire collection is indeed curious as a faithful reflection of the manners and spirit of the age in which it was published, and it is in this, I ap-

prehend that its chief, if not its sole value consists. On the subject of insurance, the laws of Oleron are wholly silent; they do not even allude to its existence, yet from this silence we are by no means warranted to infer that the practice of insurance, even in France, was then unknown. These laws in the strictest sense of the term, are laws of the sea, not regulations of commerce. With the exception of a few provisions on the subject of shipwrecks, they relate exclusively to the duties of masters and mariners, in their relations with the ship-owner and merchant, and with each other, at the inception, during the progress, and at the termination of the voyage. A contract made by the merchant or owner on land with an exclusive view to his own benefit, and which the master, as such, has no authority under any circumstances to conclude, was no more within the scope or design of such a compilation, than articles of copartnership or bills of exchange.

The laws of Wisbuy, an ancient city of Sweden, which during the 13th and 14th centuries, by means of its extensive commerce rose to opulence and power, next claim our attention. Although the writers of Sweden zealously contend for a higher antiquity, the authority of Selden, and the observations of Cleirac, are conclusive to show that they could not have been published until nearly the close of the 13th century.^(a) They are therefore posterior in date, not only to the Consolato, but also to the laws of Oleron. It appears that shortly after their promulgation, they were adopted as laws of the sea by all the nations of northern Europe, and even in the age of Cleirac, they were still observed in Sweden, Denmark, Flanders and in the north of Germany. The laws of Wisbuy in their general character, resemble the laws of Oleron. They are laws of navigation, not of commerce; but in their style and in their provisions, they certainly reflect a more advanced state of civilization and knowledge. There are some provisions that amuse us by their simplicity; but none that shock us by their absurdity or their cruelty. These laws contain no

(a) Selden de dom. Mar. c. 24. Cleirac Us et Cout. p. 3.

regulations of the contract of insurance, but they do contain a very distinct allusion to the existence of the practice, and in answer to the doubts expressed by Marshall, I shelter myself under the authority of Emerigon and Azuni, in saying that the passage in question cannot reasonably be interpreted in any other sense.^(a)

In the collection of Cleirac and in that published in the later editions of the *Lex Mercatoria* of Malines, the laws of the Hanse-towns immediately follow those of Wisbuy; but as they were not published until 1593 or 1597, they are in the order of time long subsequent to other foreign ordinances that I shall have occasion to mention. It appears from these laws that the vessels of the Hanse-towns were usually owned by several persons, and that the master himself was expected or required to be a part owner, and it is upon this state of facts that many peculiar regulations are founded. In other respects the laws of the Hanse-towns in all their provisions, like those of Oleron and Wisbuy, are laws of navigation, as distinguished from regulations purely commercial. It is true they mention bottomry, but the bottomry of which they treat, is that of the master, not of the merchant; they are silent on the subject of insurance, and that silence is explained by their general scope and character. The merchants of the Hanseatic league, when these laws were compiled, had been for nearly three centuries the carriers of the north of Europe, and during the

(a) This reference to insurance is found in Art. 66 of these laws. Mr. Marshall is probably right in the supposition that the second paragraph of this article, in the version of Cleirac, is merely a gloss or comment on the first, which is alone the text of the law; but he has failed to observe that it is upon this text that Emerigon founds his opinion—these are its words: “Si le maistre est contraint de bailler caution au bourgeois pour le navire, le bourgeois sera parcillement tenu bailler caution pour la vie du maistre.” Now, to give security for the safe return of the ship, is the same thing as to insure her—as the counter security for the life of the master is plainly an insurance on his life. Hence Emerigon, referring to the words of the law, is fully justified in saying, “Par ou l’on voit que le contrat d’assurance commençoit a s’introduire dans le commerce sous la forme et la denomination du cautionnement.” Marshall *Pre. Dis.* p. 45-6. Emerigon, *Pref.* p. xii.

whole of that period had been accustomed to meet the merchants of Italy, Spain, France, and England, at the staple-towns they had established in Flanders, Antwerp, and Bruges. That in 1597, and even in 1614, (for in that year their original laws were revised and enlarged, still omitting the subject of insurance,) they alone were ignorant of a practice that had prevailed for centuries among the merchants of the rest of Europe, it would be irrational to believe: nor is it difficult to assign the reasons for their omitting at this time, to make any special regulations relative to insurance. An ample ordinance on that subject was published at Antwerp, under the authority of Philip II. in the year 1563, and the conjecture is more than probable that the rules of this ordinance were adopted and deemed sufficient by all the merchants of the north of Europe. Of the existence and provisions of such an ordinance, in a city which was then a place of common and chief resort, they could not have been ignorant.(a)

The ordinances of Barcelona, it has been already stated, are the most ancient of all existing laws that treat expressly of insurance. But it cannot be said that their value is in proportion to their antiquity. Although the last of these ordinances repeals all prior ordinances, and declares that the regulations then enacted, shall alone be observed, it embraces in truth but a very small portion of the entire subject, nor can it be denied that many of its provisions breathe the narrow and exclusive spirit of an age in which the true principles of commercial freedom were little understood.

Mr. Magens, an eminent merchant, and author of a valuable essay on insurance, has published in his second volume a translation of nearly all the foreign ordinances on that subject, that are known to exist. Of the ordinances thus collected, those of Florence, Antwerp, Spain and Genoa, are prior in date to the French ordinance of the marine, and those of Middleburgh, Rot-

(a) Hamburgh, the chief of the Hansetowns, had no special code of insurance law until 1731. Previous to that period we have the testimony of Beneckè that the contract was governed by the usages of Antwerp—"secondo gli usi della Borsa d'Anvers." 1 Beneckè Introduc. p. 14.

terdam, Amsterdam, Coningsburgh, Hamburgh and Stockholm, were subsequently published at different periods. Although varying greatly in extent and merit, these ordinances all deserve to be known and consulted. They contain the substance of the law of insurance, as it now prevails in the respective countries and places for which they were originally enacted, and in cases where they agree, supply the clearest evidence of that general usage that we ourselves are bound to follow.

In the year 1681, in the reign of Louis XIV., and under the auspices of the illustrious Colbert, the celebrated Ordinance of the Marine was first published. It deserves a higher character and is entitled to far more ample praise than any of those that have been hitherto mentioned. It is probably the first complete code of maritime and commercial law that was ever attempted to be framed, and when we consider the originality and extent of the design, and the ability with which it is executed, we shall not hesitate to admit, that it deserves to be ranked among the noblest works that legislative genius and learning have yet accomplished. The names of the authors of this admirable work, except by vague conjecture, are still unknown; and it is impossible not to share the natural regret of Valin, that from their own modesty, and the silence and neglect of their cotemporaries, they have been deprived of the fame to which their labors so justly entitle them.(a)

Perhaps the most valuable portion of this ordinance is that which relates to insurance, and of this no more striking proof can be given than results from the fact that the framers of the present commercial code of France have adopted these chapters of the ordinance, not merely as the basis, but as the substance of their own labors on the same subject. They have made many changes of language and some few in arrangement, but with these excep-

(a) "Combien ne seroit il pas a souhaiter que nous pussions, payer a la memoire des Redacteurs de cette precieuse collection le tribut de louange d'estime et de respect, qu'ils out merité à si juste titre. Mais par une fatalité inconcèvable les noms de ces grands hommes ne sont pas parvenus jusqu'à nous." Valin, Pref. p. 4.

tions, the provisions of the two codes are nearly identical ; the alterations are so few that they scarcely deserve our attention.(a)

That after the lapse of more than a century, during which the bounds of commerce were greatly enlarged, and cases of insurance in proportion multiplied, no further changes or additions were deemed necessary, may well excite our surprise. It is a distinct admission by men admirably qualified to judge, that such were the comprehensive views, such the prospective wisdom of the authors of the original work, that in the execution of their plan, they at once foresaw and reached the limits of theoretic excellence. Yet while this praise is bestowed on the Ordinance, it must not be supposed that it is entirely free from the usual, perhaps necessary, defects of written laws. Ample as it is, it is far from embracing the whole subject of which it treats. Much additional learning and research are necessary to enable us even to understand its provisions, and a still larger portion of both to enable us to apply with confidence and safety, the rules and principles it has established. In truth, nearly every written law on a complex subject, requires a commentary—a commentary that study, reflection, and experience can alone supply.

The most important of the foreign laws, and which has superseded in France the ordinance of the marine, the Code de Commerce, yet remains to be noticed.

It was framed not only under the authority, but in a measure with the personal co-operation of Napoleon, and remains a monument of his glory, that even the enmity of his immediate successors dared not demolish or deface. It is still in force not only in France, but in Belgium, and in the larger part of Italy, and has influenced materially the legislation of other nations of Europe. On the history and excellence of a code so recent and so generally known, it is not my intention to dilate ; it is sufficient to say, that it merits pre-eminently the attention and study of all who

(a) Alauzet says : " Le titre 10 de code de commerce, qu' s'occupe de ce contrat ne fit presque que repeter les decisions de l'ordonnance sauf quelques legeres modifications presque toutes indiquees dans le commentaire de Valin." Alauzet Traite. Gen. Tom. 1, p. 112.

wish to acquire a general knowledge of commercial law. On other subjects than that of insurance, it is by no means a mere transcript from the ordinance of Louis XIV. It corrects many errors and supplies numerous omissions and defects, and in the scientific beauty of its arrangement, the luminous precision of its language, and the liberality and wisdom of its provisions, it stands, and probably will long continue to stand, unrivalled and alone.(a)

The next principal source whence the law of insurance is derived, are the treatises and essays in foreign languages, and in our own on insurance, bottomry, and other closely related subjects of commercial and maritime law. But these productions are in truth so numerous, that far from attempting a critical estimate of their merits, I shall not pretend even to enumerate their authors and titles.

The most ancient treatise in any modern language on insurance is that entitled "*Le Guidon de la Mer*," which was published in 1671 by Cleirac, a learned advocate of Rouen, in the second part of his useful work on the usages and customs of the sea. No certain account is given by Cleirac of the author or origin of this treatise, but from the character of the style and other circumstances of internal evidence, it was probably written near the close of the preceding century. It is in many respects a remarkable production. Though small in extent as compared with modern works, it is a well arranged and elaborate essay. The rules that it contains, are stated with singular clearness and precision, and many of them have entered into the general law of insurance. As compared with the present state of the science, it is of course imperfect and defective; yet it contains a much larger body of law than a cursory perusal would lead us to imagine—nor in reading it with due care, can we fail to be struck by the conviction

(a) Since the French code, two commercial codes of great value have been promulgated in Europe. That of Spain, adopted 1829, and that of Holland, which was substituted for the Code de Commerce, on the 1st of October, 1838. M. Pardessus extols highly the Spanish "*Codigo de Comercio*," but Alauzet assigns a still higher value to the code of Holland, which he evidently considers as the most perfect law that has hitherto been framed on the subject. *Traite Gen.* Tom. 1, p. 114—118.

that, in order to supply the materials necessary to its production, the practice of insurance must have existed in France for a long anterior period.

The notes of Cleirac on Le Guidon are valuable and learned, but are not equal in the extent of research to his commentary on the laws of Oleron.

Most of the older treatises on commercial law, and even some that were first published in the earlier period of the last century, according to the former custom of the learned of Europe, are written in Latin; and of the authors who have thus written, the most eminent of those who have treated specially of marine insurance, are Santerna, Straccha, Roccus, Stypmannus, Loccenius, Casaregis, and Bynkershoeck.^(a) Of the essay of Roccus, commonly called his notes, an excellent translation has been published by an eminent lawyer of Philadelphia;^(b) but I am not aware that any translation has appeared of any of the treatises or dissertations of any of the other writers that I have named. Nor can it be denied that their works, as well as those of many other authors of the same class, are in a great measure unknown to the American lawyer. It has, however, been truly remarked, and we may console our ignorance with the reflection, that the utility of these writings has been in a great measure superseded, as well as their fame eclipsed, by the more systematic and copious treatises that modern languages and times have produced.

The writers, to whom the science of commercial law is probably under the deepest obligations, are the eminent and well known French jurists, Pothier, Valin, and Emerigon. To express my sense of the peculiar and distinctive merits of these celebrated

(a) Alauzet says that Santerna and Straccha "sont les deux premiers auteurs que aient écrit sur les assurances." The exact date of the first publication of Santerna's treatise, entitled "Tractatus perutilis et quotidianus de Assecurationibus," is unknown; but it could not have been later than the beginning of the 16th century. Straccha frequently refers to Santerna. His work, "de Assecurationibus," is contained in the collected edition of his works, printed at Lyons in 1556; but it had, no doubt, been published before as a separate treatise.

(b) Joseph R. Ingersoll, Esq.

writers, I shall borrow the language of the distinguished author of the Commentaries on American Law, in the conviction that his criticism and praise carry with them an authority that will not be disputed, and are expressed in terms more select and appropriate than I could hope to employ. "Valin's copious commentary (such is the commencement of the passage I extract,) upon that part of the ordinance of Louis XIV., which relates to insurance, is deserving of great attention; and it has uniformly, and every where, received the tribute of the highest respect for the good sense, sound learning, and weight of character which are attached to his luminous reflections. Pothier's essay on insurance is a concise, perspicuous, accurate and admirable elementary digest of the principles of insurance; and it contains the fundamental doctrines, and universal law of the contract. But the treatise of Emerigon very far surpasses all preceding works in the interest, value, and practical application of its principles. It is the most elaborate, learned, and finished production on the subject. He professedly carried his researches into the antiquities of the maritime law, and illustrated the ordinances by what he terms the jurisprudence of the tribunals; and he discussed all incidental questions, so as to bring within the compass of his work a great portion of international and commercial law connected with the doctrines of insurance. In the language of Lord Tenterden, no subject in Emerigon is discussed without being exhausted; and the eulogy is as just as it is splendid." The Commentator proceeds to say that Valin and Emerigon were contemporaries, and were united by the ties of personal intimacy, as well as by the similarity of their pursuits, and that it is difficult to peruse the testimony which Valin has borne to the moral, as well as the literary and professional accomplishments of Emerigon, without being sensibly touched with the generosity of their friendship.(a)

(a) 3 Kent's Comment., p. 348. Since the time of Emerigon, numerous treatises, relative to marine insurance, have been published in France—that to which the highest value and authority are attributed, is the title "*Des assurances maritimes*," in the 3d volume of M. Pardessus' "*Cours de droit commercial*." The "*Cours de droit commercial mari-*

Notwithstanding the just praise that has been bestowed on the jurists of France, it is to Germany that the glory probably belongs of having produced, within a recent period, the most comprehensive and perfect work on insurance and maritime loans that has yet appeared. It is at once the most scientific and the most practical, the most copious and accurate, the most original and profound. The object of this admirable work, is not only to exhibit fully the laws and usages of all the commercial nations of Europe in relation to the subjects of which it treats, but from a comparison of their various and sometimes conflicting provisions and a searching inquiry into the reasons on which they are founded, to deduce and ascertain the principles, that from their superior equity or certain utility ought to be universally adopted. It abounds in new and striking reflections, and it displays powers not only of laborious research, but of analysis, comparison and generalization, that give to the author a just title to be ranked in the small class of patient and original thinkers. The volumes of this work appeared at Hamburgh in successive years, beginning in 1805, but the complete edition in five volumes, was not published until 1810. Its title translated is, "A System of Insurances and Maritime Loans deduced, as well from the nature of the subject as the law and usages of Hamburgh, and the principal commercial nations of Europe, and adapted to the use of Insurers, Merchants and Lawyers," and this title well expresses the character and extent of the work. Its author was William

time" of Boulay du Paty, the 3d and 4th volumes of which relate chiefly to insurance, and the "Traite General des Assurances" of Alauzet, are also works of great merit; and the latter contains some striking and original views as to the extension of the contract of insurance to many subjects to which it has not hitherto been applied. In Italy, also, several estimable treatises have appeared. The most extensive and scientific is that of Baldasseroni, in 5 volumes. The two first are devoted to marine insurance—the third to maritime loans and average, and the two last are occupied by judicial decisions, and a translation of most of the ordinances on insurance. Baldasseroni is, probably, the first of the continental writers who has referred to the English decisions and writers. He has availed himself largely of the labors of Mr. Park.

Benecke, (a) a merchant of Hamburgh, who shortly after the completion of his labors, removed to the city of London, and published there, in 1824, his well known and valuable treatise "On the Principles of Indemnity in Marine Insurance, Bottomry, and Respondentia," a treatise, which although principally extracted from, is, in fact, an inconsiderable portion of his original work. An excellent translation in Italian of the system of Benecke, was published at Trieste, in 1828, by Antonio Rosetti, a merchant of that city, and it is from this translation that I have acquired the knowledge I possess, of the contents and merits of the original. The production of such a work as the system of Benecke by one merchant, and its translation by another, are circumstances that may justly be regarded as characteristic of the age in which we live, and while they justify the pride, should excite a generous emulation in the minds of those who belong, or expect to belong, to the profession which they dignified and adorned. (b)

The oldest work on commercial law in the English language, is the *Lex Mercatoria* of Gerard Malines, a merchant of London, of which the first edition was published in 1621. In the present state of the science, the observations in this work on Marine Insurance cannot be said to possess any importance, but the whole work as an object of historical and antiquarian curiosity, is by no means destitute of value. Among other facts, it is interesting to know that in the time of Malines, the rate of premium on ordinary voyages varied from 9 to 12 per cent. Rates so exorbitant compared with those of modern times, seem at first to afford a

(a) My subsequent examination of the labors of Benecke, has satisfied me that his work is not quite so original, as its first perusal led me to believe. He has appropriated nearly the whole of Mr. Marshall's treatise, copying not merely his statements of the decisions, but borrowing his reflections and critical remarks, and he has not stated the extent of his obligations so explicitly as he ought to have done. With this deduction, however, his work still remains the most copious, instructive and luminous, that has hitherto been published.

(b) The most recent German work on Insurance is the "See-Asseuranz Rechts," of Meno Pohls, J. U. D., in two volumes, 8vo., Hamburgh, 1840. It is scholastic and obscure, but learned and accurate, and I shall have frequent occasion to refer to it.

striking proof either of the increased security of navigation, or of a vast improvement in the knowledge of its actual risks : yet upon reflection it seems more probable that it is to the extension of the bounds and subjects of commerce, and consequently of the practice of insurance, that the great reduction in the rates of premium, is chiefly to be ascribed.

It is not my intention to notice the numerous works on commercial law treating more or less fully of marine insurance, which were published in England in the long interval between the age of Malines and the publication of the celebrated compilation of Park. Most of these works had a certain value when published ; but none of them, with the exception of the volume of Magens containing the Foreign Ordinances of Insurance, can be considered as the sources whence the lawyer or merchant of the present day can find it necessary or expedient to derive his information. From motives of liberal curiosity, they may still be consulted, but with a view to actual instruction, their utility has been long superseded.

In 1786 Mr. Park, an eminent lawyer who was afterwards raised to the office of judge of the Court of Common Pleas in England, published the first edition of his *System of the law of insurance* which in successive editions he afterwards greatly enlarged and improved. This work is voluminous and elaborate, and on a cursory inspection, seems to comprise a full examination of the law of insurance in all its branches ; yet it is in truth little more than a compilation of cases and decisions, arranged under different titles and divisions, and has few claims to the character and praise of a complete and scientific treatise. It is an exposition of the law of insurance, not as deduced from the nature of the subject, and the general usage of commercial nations, but as it appears in cases adjudged in the courts of England, which are set forth and recited in all their minutest and most unimportant details. It is seldom that Mr. Park attempts to examine or question the authority of the cases that he quotes, or to explain or reconcile their apparent contradictions, and on questions not expressly adjudicated, he scarcely ventures an opinion, and never considers

or discusses them with a view to their satisfactory decision. It is doubtless true, that Mr. Park is entitled to the praise of being the first artist who endeavoured to reduce the English law of insurance to the beauty or order of a regular science, but it is in the originality of the attempt, I apprehend, that its principal merit consists. And it is as a laborious and faithful collection of cases and not from its scientific excellence, that his work retains its use and value.

It was with the avowed design of supplying the defects in the work of Mr. Park, that Mr. Sergeant Marshall published, in 1802, his valuable Treatise on the law of insurance—a production that, in its actual execution, corresponds in a measure with the design of its author. In all the constituent qualities of excellence, in style, arrangement, perspicuity and logic, the Treatise of Marshall seems greatly superior to the System of his predecessor. Mr. Marshall subjects many of the cases that he cites to a searching analysis, inquires fully into the reasons on which they are founded, and compares them with the essential nature of insurance, and the laws and usages of other nations; and his object throughout his work, is to found the science that he teaches, not on the mere authority of decisions, sometimes conflicting and sometimes arbitrary, but on the basis of principles, immutable and universal.

Since the publication, on which I have commented, no work on marine insurance, that has attained any station of authority, with the exception of the treatise of Benecke, already mentioned, has been published in England; but in our own country a work has appeared that, by the general judgment of the profession, is already ranked with the System of Park and the Treatise of Marshall; and from its character of permanent utility, it well merits the place it has attained. I refer to the well known treatise of Mr. Phillips, of Boston, which was first published in a single volume in 1825, but has been greatly enlarged and improved in the last edition, in two volumes, published in 1840. In addition to the English cases of Park and Marshall, the treatise of Mr. Phillips embraces a full collection of American decisions; nor is it by any means, to be regarded as a mere compilation of cases. It is a

work of reasoning as well as of research, and conveys much practical information that will be sought for in vain from preceding writers. To the American insurer, as well as practising lawyer, it is, from its constant utility, a necessary companion.

To those who, by a vigorous exercise of reflection, are competent to grasp the knowledge of principles without a minute examination of the cases and decisions from which they are extracted, the compendium of the law of insurance, in the third volume of the Commentaries of Kent, may be safely recommended as worthy of their entire confidence and most diligent study; nor can its merits be described in language more forcible and just, than the author has himself applied to the treatise of Roccus. "It is distinguished by the soundness of its logic, its admirable precision, and vast power of compression."

The mention of his Commentaries, and the recollection of the judicial labors of their author, have suggested a theme on which, were I not restrained by obvious motives, I should deem it a privilege to expatiate. It is not now the time for pronouncing a fitting and discriminative eulogy on the services and character of this venerated man; but when that period—a period, I trust, still distant—shall arrive, narrow must be the understanding, or perverted the heart of the American lawyer, who will not rejoice to confess our debt of gratitude to him, who, by the example of a pure and spotless life, as well as by his labors and his writings, has ennobled the character, and exalted the dignity of our common profession.

The adjudged cases, in the reported decisions of the courts of Common Law in England and in the United States, constitute by far the richest and most abundant source whence the law of insurance as it now exists is, or can be derived. On the advantages to be gained from an attentive study of foreign laws and foreign jurists, I have already dwelt; yet if a perfect system of the law of insurance, in all its extent, and in all its branches, shall ever be constructed, the judicial decisions to which I refer, will be found to supply its most extensive and choicest materials, and it is principally from the English reports that these materials must be drawn. It is, however, a remarkable fact, that the cases of

insurance that have arisen, and been decided in the courts of the United States during the present century, are at least as numerous, and certainly as important and difficult, as those that have occurred in England during the same period.(a) Many of these cases have called forth the highest efforts of forensic ability and learning, and in many the opinions of the judges, and the arguments of counsel, have displayed an extent of learning and research, a comprehensive knowledge, and discriminative application of principles that justify the assertion, that in no country has the study of commercial law as a science, been more thoroughly and successfully pursued than in our own.

That some erroneous decisions have not been made, it is far from my intention to affirm. In the course of these Lectures I shall have occasion to show, and to express my regret, that on some questions we have departed widely from the general law of insurance, and have permitted rules to be introduced, that violate the essential nature of the contract and deeply impair its utility; but the errors to which I refer are by no means so numerous or grave, as to affect the truth of the praise to which the American decisions on commercial law are generally entitled.

On the benefits that have resulted to society, from the introduction of insurance, it is not necessary that I should long dwell. They are obvious and undeniable—not a matter of speculation, but of experience and knowledge. It is commonly said that the chief advantage of insurance is, that it divides among several persons a maritime loss, that if suffered to fall with undiminished weight, might crush the individual owner or merchant; but although from motives of humanity, we may rejoice that many are thus saved from the ruin in which they might otherwise be involved, it is not in this division of the loss that the public benefit of insurance consists. Where the insurers and the assured be-

(a) The reader may satisfy himself of the truth of this assertion, by comparing the insurance cases in the reports of New-York, Massachusetts, Pennsylvania, Maryland, and of the Supreme Court of the United States, from the beginning of this century to 1840, with those to be found in the English reports, during the same period.

long to the same country, it is manifest that the deduction from the national capital, or in other words, the loss to the nation, is precisely the same, whether it be cast upon an individual or distributed among many. The benefit that the nation derives from insurance is, that it extends and enlarges to the utmost limits of profitable enterprise, the commerce that it protects. Trusting to the security that it affords, thousands are induced to embark in mercantile pursuits, from which the want of means, or the dread of loss, would otherwise have repelled them. It is insurance that supplies courage to the timid, and capital to the needy, and in the competition that ensues every source of legitimate gain is certain to be explored, every outlet of profitable adventure to be discovered and followed. To estimate the value of marine insurance, we must not look merely at the amount of the losses for which it provides a compensation, but at the number and success of the voyages that it prosecutes and protects, and at the amount and value of the commodities that it creates, exports and returns. Those who are the enemies of credit in every shape, who believe that confidence should never be reposed because it may always be abused, if consistent with themselves, may desire that insurances were abolished or unknown, but those who believe with me, that credit, in one or other of its multiplied forms, has cleared our forests, cultivated our fields, and built our cities, will also rejoice with me, that credit in the form of insurance, the confidence reposed in the assured and the financial credit his policy gives him, has spread our canvass over the ocean, and made our flag a welcome visitant in every port of the civilized world.

The distinguished jurists who framed the title of insurance as it now appears in the commercial code of France, closed their report to the council of state, with a brilliant eulogy on the beneficent contract to which their labors had been devoted. This eulogy is somewhat rhetorical and figurative, and to a taste strictly attic, may seem extravagant, yet in the language of poetry it utters the conclusions of experience and truth. Somewhat altered and expanded it shall form the close of this discourse.

Marine insurance may justly be deemed one of the noblest

creations of human genius. From a lofty height it surveys and protects the commerce of the world. It scans the heavens, it consults the seasons, it interrogates the ocean, and regardless of its terrors or caprice, defines its perils and circumscribes its storms. It extends its cares to every part of the habitable globe, studies the usages of every nation, explores every coast, sounds every harbor. To the science of politics, it directs a sleepless attention; it enters the councils of monarchs, watches the deliberations of statesmen, weighs their motives and penetrates their designs. Founding on these vast materials its skilful calculations, secure of the result, it then addresses the hesitating merchant: "Dismiss your anxiety and fears: there are misfortunes that humanity may deplore, but cannot prevent or alleviate. Such are not the disasters you dread to encounter. Trust in me and they shall not reach you. Summon all your resources, put forth all your skill, and with unfaltering courage pursue your adventures. Succeed, your riches are enlarged. Fail, they shall not be diminished. My wealth shall supply your loss. Rely on me, and for your sake, at my bidding, the arm of your enemies shall be paralyzed, and the dangers of the ocean cease to exist."

The merchant listens, obeys, and is rewarded. Thousands, tempted by his success, follow his example. Those whom it had long separated, the Ocean now unites. The Quarters of the world approach each other, and are bound together by the permanent ties of mutual interest and mutual benefits.

THE
LAW AND PRACTICE
OF
MARINE INSURANCE.

LECTURE I.

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§ 1. My design in these Lectures, is to exhibit the principles and rules of Marine Insurance, in that, which has seemed to me, their most appropriate and logical order, and to furnish such an explanation of the reasons on which they are founded, as my researches or reflections may supply. It is not my intention to recite at large, the various cases and decisions, in which the rules, that I shall attempt to explain, have been established or admitted; but in the treatment of each branch of the subject, I shall endeavor to comprise the whole of the law that properly belongs to it, and by a diligent analysis, to discover the method best suited to its clear and consistent development. I shall be careful throughout to distinguish the positions that are established and certain, from those that are disputed or doubtful; and upon questions not settled by paramount authority, to separate those conclusions that rest only upon general reasoning, from those that are sanctioned by the usage of other nations, or supported by the concurrent opinions of eminent jurists.

§ 2. As a necessary preface to that division of the subject which I have adopted, it is proper to repeat, in a more condensed form, the definition of Marine Insurance that has already been given. It is a contract of indemnity, in which the insurer, in consideration of the payment of a certain premium, agrees to make good to the assured, all losses, not exceeding a certain amount, that may happen to the subject insured, from the risks enumerated or implied

in the policy, during a certain voyage or period of time. It follows from this definition that every valid policy must specify—

1. The parties between whom, and on whose account the insurance is made.

2. The consideration or premium paid.

3. The subject insured.

4. The amount insured.

5. The risks insured against. And, lastly,

6. The voyage or period of time during which the insurance is to continue in force.(a)

To complete however the legal dissection of the policy, it will be necessary to consider, under a separate head, those conditions implied and expressed, usually termed warranties, on the fulfilment of which, the validity of the entire contract depends.

These several subjects, although, for reasons that will hereafter be explained, in an order somewhat differing from that in which they have been named, will be treated in succession, and in connexion with one or other of them, and according to their actual relations, all the usual clauses and stipulations of the policy, and all the obligations implied as well as expressed of the parties, will be fully considered and explained.

§ 3. There are, however, some topics that cannot properly be included in an analytical development of the contract itself; but which, as preliminary in their nature, demand to be separately treated. These I shall arrange and consider under the following heads: 1. The form and execution of the policy. 2. The rules of law applicable to its interpretation; and lastly, insurances void in their

(a) Note I.

origin, as contravening the laws of the state in which they are effected. The propriety of considering the topics embraced in the first and second of these divisions, as preliminary, is too apparent to require explanation; and the reasons that have determined me to consider those embraced in the last, as belonging to the same category, when hereafter stated, will be found to be satisfactory.

I. Of the form and execution of the contract.

§ 4. I shall include under this head, in addition to the remarks that strictly belong to it, a consideration of the construction and effect of agreements to insure, and of alterations in the policy, and shall conclude with a few observations in relation to the necessary and usual clauses in English and American policies, and a statement of the more general divisions of insurances.

§ 5. In this country, there is no statute in any of the states that requires that the contract of insurance shall be in writing; and upon the principles of the common law, an unwritten, or in technical language, a parol agreement is doubtless sufficient; but as the usage of a written contract has long and universally prevailed, it has probably acquired the force of law, and it is doubtful whether an action upon a contract, merely oral, would now be sustained. Insurance, as a branch of the law merchant, we have already seen, does not depend solely on the rules of our municipal law, but upon questions not settled by positive decisions, is governed by the general usage of the commercial world. Hence I adopt the opinion, that the general and uniform practice of merchants, from the earliest times, ought to be considered as evidence of the legal necessity of a written contract, with the same propriety that a bill

of sale is held to be necessary by the universal maritime law to pass a valid title on the transfer of a ship.^(a) There has been no express decision on the point in any of our courts, nor is there more than a single case to be found in our reports, in which the question has been agitated ; and in this, the judges finding that they could place their decision upon other grounds, purposely abstained from the expression of an opinion.^(b)

In England, the necessity of a written contract does not rest solely on an immemorial usage. An act of Parliament passed in the 35th year of George III., (35 George III. c. 63,) expressly enacts, that every contract or agreement for any insurance, liable to a duty by the terms of the act, shall be engrossed, printed or written, and shall be called a policy of insurance, and that every such policy shall specify the premium, or consideration in the nature of a premium, paid or contracted for, the particular risk or adventure insured against, and the names of the underwriters, and the sums insured ; and in default thereof, shall be wholly void. Those provisions of the act that impose a duty and require a stamp, seem to embrace all marine insurances without an exception, whatever may be the rate of premium or the amount insured. In France, the Code of Commerce not only requires that the contract be written, but specifies, with minute particularity, the several facts and circumstances that it must express ; such as the day and even hour of the day—whether before or after noon—on which it was executed, the name and

(a) Vide opinion of Lord Stowell, in the case of the *Sisters*, (5 *Rob. Adm. R.* 155,) and the learned note of Judge Story, (*Abbott on Shipping*, *Story's ed.*, p. 2, note 1.)

(b) Note II.

residence of the assured, the name of the vessel and of the master, the ports at which the vessel shall be at liberty to touch and trade, and other similar facts. It is said, however, by Boulay Du Paty,^(a) that notwithstanding these provisions of the code, an unwritten agreement, if confessed by the parties, will be executed by the tribunals; and according to Valin and Pothier,^(b) the same construction was formerly given to similar provisions in the Ordinance of the Marine. Most of the foreign ordinances are imperative in requiring that the contract shall be in writing, and shall specify certain enumerated facts, and some of them even prescribe the form of the policy or policies that can alone be used. The expediency of regulations thus minute and special may well be questioned. The restrictions that they impose, judging from the experience of England, and our own, are not required by any reasons of public utility; and if unnecessary, they are certainly unwise, and perhaps unjust.^(c)

§ 6. The policies in use in different countries are exceedingly various in form; but from this variety in the form of the contract, we are not to infer a similar variety in the laws and usages by which it is governed. The law of insurance may be substantially the same in two countries in which the forms of the policy widely differ.

Where the perils that an insurance shall cover, except so far as they are varied by the special agreement of the parties, are defined by law, as is the case in most of the countries of Europe, a valid and sufficient insurance may be made by general

(a) 3 Boulay Du Paty, 246.

(b) 2 Valin, 20. Pothier *Traité du Contrat d'Assurance*, n. 96, 97.

(c) Note III.

words ; but in England and in this country, as there is no similar law, a specification of the risks is an essential part of the contract. Yet the risks which the foreign laws define, and those which our policies enumerate, are in truth nearly identical ; the terms used not only correspond in their usual meaning, but generally speaking, in their legal construction. In every country of Europe, except England, a double insurance, that is an insurance on property, and risks fully covered by a prior policy, is prohibited by law ; and hence the policies of the continent contain no clauses similar to those in our own relative to prior and subsequent insurances ; yet, by virtue of these clauses, our law, in respect to double insurances, is substantially the same as the general law of Europe.

The differences that exist between the policies in use in different ports or cities of the same country, or of different countries governed by the same law, are generally significant of a different intent, and affect not merely the form, but the substance of the contract. Thus, the differences between the Boston policies and those of New-York, vary materially the interpretation of the agreement. The Boston policies restrict, in some respects, the liability of the insurers, and diminish proportionably the rights of the assured. The policies of Philadelphia, Baltimore, and Charleston, also differ from those of New-York ; and so far as my information extends, there is not an exact correspondence between the policies in use in any two of the cities of the Union. The extent of these variations, and their effect on the rights and obligations of the parties, will hereafter be considered.

In New-York the forms of the policy in use for

the different subjects of insurance are distinct and separate, and the practice deserves to be commended as highly judicious. Where a single form is used, and the real subject of insurance is designated only by writing in the body or margin of the policy, questions may well arise, whether clauses, that in their original intent were applicable solely to a different subject, may not, by their adoption in the contract, be applied wholly or in part, to the subject insured, and these questions may render a consistent interpretation exceedingly difficult.

§ 7. The use of printed forms for the policy, is now universal, and to the existence of the usage, many decisions expressly refer. In these forms, the necessary and usual clauses, stipulations and exceptions of the contract, according to the laws and usages of the place where the insurance is made, are fully printed, and blanks only are left for inserting the names of the parties, of the vessel and master, the rate or amount of premium, the amount and subject insured, and such other facts, as by law or usage are necessary to be specified to render the agreement valid. When a general application for insurance is made, it refers in the judgment of law, upon the understanding of the parties, to an insurance in the form of the policy in use, at the place or office where the application is made. Where no alterations in the printed form are desired, the application need only express the facts necessary to be inserted in the blanks of the policy, and where alterations are required, they should be distinctly stated. As the subsequent interpretation and effect of the policy frequently depend upon the representations of the assured previous to its execution, it is always a prudent course to enumerate

the facts that the representation is meant to include in the written application.(a)

§ 8. Although the contract of insurance imposes or implies mutual obligations, those on the part of the assured are merely conditions, on the performance of which his own right to an indemnity depends. They do not in any instance create a duty that the insurer may compel him to perform, and although their violation constitutes a valid defence, it never furnishes a substantive cause of action. All the positive stipulations of the contract that may be enforced by law, are on the part of the insurer. Hence, it is not necessary, that the policy should be signed by both parties. The subscription of the insurer is alone sufficient, and this practice, which some have supposed is justified only by usage, has its true origin in the very nature of the contract. Should a policy contain a promise on the part of the assured for the payment of the premium on a future day, as is said to have been the ancient form on the continent of Europe, the signing by both parties would doubtless be necessary ; but this necessity is wholly superseded when the payment of the premium, as is almost universally the case, is acknowledged in the policy.(b)

§ 9. Where the insurance is made by an incorporated company, the execution of the policy must be attested by the officer or officers designated for that purpose, by its charter, or by its by-laws. In the United States, according to the recent decisions, the addition of the corporate seal is not necessary to complete the attestation, unless its use is enjoined by the charter.(c)

(a) Note IV.

(b) Note V.

(c) 1 Phill. p. 8, and cases there cited.

§ 10. When a policy has, in fact, been executed, and notice of its execution has been given to the assured, its actual delivery is not essential to the completion of the contract. The insurer, whether an individual, or an incorporated company, would not be allowed to retract a consent thus confessed to have been given; but would be considered as holding the policy for the benefit of the assured, and bound to deliver it at his request. Should a loss occur, and the policy then be withheld from the assured, it would not be necessary for him to seek the aid of a court of equity. He would have a complete remedy in an action at law.(a)

§ 11. Where an application for insurance is accepted by the insurer, the rate of premium and the date inserted, and the writing signed by the parties, it constitutes in equity, a valid insurance, and in law a valid agreement to insure—it gives to the assured an immediate right upon the tender of the premium or premium note, to demand from the insurer the execution and delivery of a policy, corresponding with the terms and date of the application. Should a loss occur before the execution of the policy, a court of equity would doubtless relieve the assured, and upon a bill properly framed, instead of confining itself to a specific execution of the agreement to assure, would probably decree the payment of the loss. Such was the relief given by Lord Hardwicke, on a bill filed to correct a mistake in the policy, and in principle, there seems to be no distinction between the cases. It is even probable, that the assured might recover the loss in the form of damages, in a suitable action at law;

(a) Note VI.

but the discussion of these technical questions is foreign to my design.(a)

§ 12. It is not requisite to the validity of an agreement to insure, that it should be contained in a writing signed by the parties. It may be made by a correspondence, and when the parties reside in different places, it is frequently concluded in that form; but in such cases to enable a court to deduce a contract from the letters of the parties, the evidence of the assent of both, to all the terms proposed, must be clear and unequivocal. In the language of an eminent judge, it must appear that the minds of the parties had fully met. The contract is not perfected by the assent of the applicant to the terms offered by the insurers, if that assent be accompanied by any new conditions. The assent of the underwriters to any modification of the terms proposed by them, generally speaking, must be established by the same evidence as their original offer, although, under special circumstances, as when the applicant has transmitted a note for the premium, the silence of the underwriters, in their omission to inform him in due season of their dissent, and to return the premium note, might justly be held to conclude them.(b)

§ 13. It has been decided in Massachusetts, that where an insurer has offered by letter to insure upon certain terms, the agreement is not consummated by the mere acceptance of the terms by the party to whom they are proposed, but that the insurer is at liberty to retract his offer at any time, before notice of its acceptance has been received by him. But this case cannot be regarded as suffi-

(a) Note VII.

(b) Note VIII.

cient evidence of the general law ; on the contrary, looking to the probable understanding of the parties, the usage of merchants in similar cases, and the authority of analogous decisions, an offer to insure made by letter, must be considered as a valid undertaking that the party will be bound by it, if in due season a favorable answer be returned ; and consequently, the offer cannot be retracted, unless the countermand reach the party to whom the offer was addressed, before his letter of reply, announcing his acceptance, has been transmitted. When a bargain is orally proposed, it is not doubted, that its immediate acceptance in all cases binds the contract ; but an offer communicated by letter is made when the letter is received, and its acceptance then, if transmitted by the first opportunity, is immediate ; that is, it is just as immediate as from the mode of communicating the offer, it was possible it should be. The adoption of the opposite rule, according to the reasoning of the court of King's Bench, would render the conclusion of an agreement by mutual letters quite impracticable. If the insurer is not bound by his offer until he has received notice of its acceptance, but in the interval may retract it, the applicant cannot be bound by his acceptance, until he has received notice that it has been assented to by the insurer ; nor again, the insurer, until he has received notice that his assent to the acceptance has been assented to by the applicant—and so on, in an endless succession, until the parties in despair renounce a correspondence in which, from its nature, the series of letters must be infinite.(a) But although the insurer

(a) Note IX.

is necessarily bound by his offer, during the interval that has been stated, it must not be inferred that the applicant has the right, under all circumstances, to accept the offer when he receives it. If, before he agrees to a policy upon the terms proposed, a loss has occurred, or he has been advised of any facts increasing the risks, as understood by the insurer, his acceptance of the offer, unaccompanied by a full disclosure of his knowledge, suspicion, or advice, would be a fraud that would vitiate the contract. He has no right to close the agreement if he knows or believes that there has been any material change in the circumstances that were contemplated by the insurers, as affecting the risks, when they proposed to assume them.

§ 14. It is said to be the custom of some of the insurance companies in the United States, when the terms of an insurance are agreed upon, to make an entry of them in the books of the company, and from that time both parties are considered to be holden, in case a loss or an arrival should happen before the actual execution of the policy.^(a) But, although, this entry would probably be sufficient evidence to charge the company, I know not upon what principle it could be received as evidence of a contract on the part of the assured, unless his assent to it when made, or a direct authority from him to the person making it, were expressly proved. It would be a dangerous presumption to consider the officer of the company making the entry as the agent of both parties; nor is it perceived upon what reasonable grounds the presumption could be rested.

(a) *M'Culloch v. Eagle Ins. Co.* Prescott; Argu. (1 Pick. 270.)

§ 15. Whether, by the existing usage in England, there is any agreement to insure independent of the policy, capable of being enforced in law or in equity, I am not enabled to state. It appears that it was formerly the custom of the private underwriters to subscribe their names prior to the execution of the policy, to a paper memorandum, called a slip, embracing the general terms of the contract, and the particulars necessary to be inserted in the blanks of the policy; but as this memorandum was unstamped, it has been decided that it could not be adduced as evidence of an agreement in a court of law;(a) and the same defect would seem to be a fatal objection to a decree in a court of equity for its specific execution as a valid agreement, unless in cases where there has been a part performance by the payment of the premium.(b)

Since the decisions to which I have referred, as declaring the invalidity of unstamped agreements, an act of parliament has been passed for the avowed object of abolishing the practice, (54 Geo. III. c. 144,) by providing for the stamping of preliminary agreements to insure. It declares that "every such contract of insurance being duly stamped, shall be available as a competent instrument of insurance in case a regular policy shall not be underwritten in lieu thereof," and provides for a return of the duty on the agreement where a regular policy is underwritten, and produced to the commissioners of stamps. It seems probable that the present usage in England is in conformity to the provisions of this statute.

(a) Marsh. on Ins. 286, n. 1. Park, (Hild. ed.) 39. Rogers v. McCarthy. Marsden v. Reid, (3 East, 572.)

(b) Note X.

§ 16. The policy, from the time of its execution, with the exception of the cases to be hereafter stated, in which extrinsic proof may be received, constitutes the sole evidence of the agreement of the parties ; nor, subject to these exceptions, can any previous letters or communications between them, nor even the written application or agreement, be used to vary or control its interpretation.(a) If, from mistake, the policy has been so framed as not to correspond with the previous agreement of the parties, the error may be corrected, and the policy reformed in a court of equity ; but this equitable power of remodelling a written agreement, is wisely exercised with extreme caution, and only upon the clearest evidence.(b) To justify the remedial action of the court, the existence of the mistake, if positively denied by the insurer, must be established by proof *morally* irresistible. The prudent merchant will examine his policy as soon as he receives it, for the purpose of ascertaining whether it correspond with his previous agreement, and if a mistake be discovered, will demand from the insurer its immediate correction. If he delay the examination until a loss occur, the delay may be construed as evidence of his assent to the contract as expressed in the policy, and may thus deprive him of the relief to which his title otherwise could not have been disputed.

(a) *New-York Ins. Co. v. Thomas*, (3 Johns. Cases, 1.) *New-York Gas Light Co. v. Mech. F. Ins. Co.*, (2 Hall, 108.) *Phoenix F. Ins. Co. v. Gurnee*, (1 Paige, 278.) *Higginson v. Dall*, (13 Mass. 99.) *Dow v. Whetten*, (8 Wend. 166.) *Ewer v. Wash. Ins. Co.*, (16 Pick. 502.) *Van Ness v. The United States*, (4 Peters, 286. Opinion of Story, J.)

(b) Note XI.

§ 17. The power of a court of equity to receive in evidence the previous agreement of the parties, is not limited to the cases in which the agreement is made the basis of a reformation of the policy by an alteration of its terms. When a policy is intended to embrace the special provisions of an agreement, but is so ambiguously expressed as to involve the meaning of the parties in serious doubt, the terms of the agreement may, with propriety, be invoked, to aid and fix the interpretation. Thus, should a policy contain a clause, that the insurance shall be void, if a policy on the premises insured is made in England, the words "is made" are so ambiguous that not only without violence, but in perfect consistency with their popular use, they may be limited to an insurance prior in date, or be construed to embrace any insurance, whether prior or subsequent, made in England, before the determination of the risks ; and should it appear from the previous agreement that, by the intention of the parties, they were to be understood in their most extensive sense, it is this construction that a court of equity would hold itself bound to adopt. Whether the same evidence might not, with entire propriety, be admitted for the same purpose in a court of law, is a question that will hereafter be considered. It is only, however, when the policy is on its face ambiguous, that the previous agreement is permitted to control the interpretation. When the terms of the policy suggest in themselves a plain and reasonable construction, if that construction be not directly at variance with the words of the agreement, it must be adopted. The agreement may explain an ambiguity or correct a mistake, but

the policy must exhibit the ambiguity, or the agreement demonstrate the mistake.(a)

§ 18. When there is no positive agreement signed by the parties, a misapprehension of the intentions of each other may frequently arise, and several cases of this description are to be found in the books.(b) When the assured discovers by the examination of his policy, that it expresses a contract different from that he intended to make, and ascertains by inquiry from the insurers, that his true intentions were misunderstood, although he may not compel them to alter the policy, so as to embrace stipulations to which they never meant to assent, he may, with propriety, demand that the contract be rescinded, and the premium, or premium note, be returned, and to this extent, a court of equity, upon an application made in due season, would probably relieve him. To warrant, however, the interference of the court in such a case, it seems essential, that the bill should be filed during the pendency of the risks, and whilst the situation of the parties is unchanged. The determination of the risks, either by the arrival of the vessel or the occurrence of a loss not covered by the policy, would raise an opposite equity in behalf of the insurers, by which that of the assured would be effectually repelled. There would then be no certain evidence, that the contract sought to be rescinded, would not have been enforced, had a loss occurred, that under the terms of the policy might have been recovered, so that to compel the insurers to refund the premium, might involve the injustice

(a) Note XII.

(b) *Graves v. Boston Mar. Ins. Co.*, (2 Cranch, 419.) *Lyman v. United Ins. Co.*, (2 Johns. Ch. Rep. 630.) Vide Note XI.

of depriving them of a compensation for the risks which they had in fact sustained.(a)

§ 19. When the policy is framed on the basis of a written agreement, it is not in all cases necessary or proper, that all the facts or stipulations contained in the memorandum of the agreement, should be introduced into the policy. Such only are to be inserted, as from their nature and object, it may be justly presumed, were intended by both parties, to form an integral part of their final contract. There are few distinctions in the law of insurance, it will hereafter be seen, more significant and material than that which subsists between a *representation* and a *warranty*. None in respect to which, it is in numerous cases, of more vital importance to the assured, that his own intentions should be strictly followed. The very being of his contract, and his right to any portion of the indemnity he meant to secure, may depend on their observance. The agreement may contain a positive statement or stipulation in regard to a present or future material fact, to which effect as a representation might properly be given by the rules of law, and which the assured intended should operate only as such, yet its mere transference to the policy, in the very terms used in the agreement, without any further or express stipulation, would convert it into a warranty, which, although made in good faith, and substantially true, by its literal falsity, might annul the contract. It is this very mistake, that the officers of a company, in making out the policy, from obvious reasons, are the most likely to commit, and it is against its occurrence, that the merchant,

(a) Note XII.

by an immediate examination of the policy, should be sedulous to guard. It appears to me, that the following may be justly stated as the rule, that the officers of a company, in making out a policy in conformity to the application and agreement, are bound to follow. They should not consider themselves as authorized to insert in the policy, any statement or stipulation, however strong and positive in its terms, that would be valid, if construed as a representation, unless the intention of the applicant that it shall be understood as a warranty, is expressly declared. Where the insurers are unwilling to insure without a warranty of the facts represented, they should communicate their wishes to the assured before they accede to his proposals, and with his assent, should alter the agreement, where an agreement is to be signed, so as to express their mutual intentions.(a)

§ 20. It is immaterial, whether the written words of a policy are inserted in the body of the instrument, or written on its face, or in the margin. If they were in fact, written before the execution of the policy, or by mutual consent after the execution, and before the commencement of the risks, they are essential parts of the contract.(b) Whether the decisions on this subject in England and in this country, have not sanctioned a dangerous laxity, is a question that merits the serious consideration of insurers. Under the existing practice, the temptation to fraud is evident, and the means of its detection, difficult and uncertain. The strict regula-

(a) The above observations were suggested, and are fully justified by the very able opinion of Mr. J. Story, in *Andrews v. Essex F. and M. Ins. Co.*, (3 *Mason*, 11, 12, 13.)

(b) Note XIII.

tions of other countries, adopted with an express view to the prevention of fraud, stand in a remarkable contrast, to the authorized laxity of our own usage. In France, not only must all that is written be inserted in the body of the policy, but if any blank is left in which other words may be written by the assured, the contract is void—with us not only are spaces left in the policy, but to increase the temptation they may suggest, the face and margin are offered to the ingenuity of fraud as an open field for the display of its powers.^(a) It is a striking proof of the general good faith and probity of the assured, that no case is to be found in the English reports or in our own, in which a fraud of this character is alleged to have been committed.

§ 21. I am not prepared to affirm with Mr. Phillips, that a memorandum on the back of the policy, not referred to in the body of the instrument, nor signed by the insurer, would be considered a part of the agreement, or be permitted in any manner to vary or modify its terms. There has been no decision to that effect, nor in the United States, is such the understanding and practice of merchants and insurers. When such a memorandum is not expressly referred to in the body of the policy, it is always signed, either by the insurer alone, or by both parties, according to the nature of the provisions that it contains.

§ 22. When a policy refers to any other document or paper, as a general rule, the contents of the document or paper, become a part of the contract as fully as if they were recited or incorporated in the policy. The effect, however, of those contents,

(a) Note XIV.

upon the construction of the policy, will depend upon the nature and object of the document, and upon the terms in which the reference is made. The statements and stipulations in the document, may operate either, as a warranty, that must be literally complied with, or as a representation of which the substantial truth is alone required, according to the intention of the parties as collected from their language. All the decisions on this subject, have been made upon policies against fire, but the principles upon which they proceed, it will be seen hereafter, are just as applicable to marine insurance.(a)

§ 23. A policy is not of necessity confined to a single subject or adventure, or an unbroken period of time. Various subjects, and successive, and independent risks, may be included in the same policy, and may either be embraced in one entire contract, by the insurance at one premium or rate of premium, of a sum in gross on all the subjects and risks, or be divided under several distinct contracts, by the insurance of a separate sum, on each subject and with rates of premium varying according to the subjects and the risks. Thus, where vessel, cargo and freight, are insured, say for \$30,000, in one valuation, and at one rate of premium, on a voyage from New-York to Liverpool, the contract is entire and indivisible; but when \$10,000 are insured on the vessel, on an outward and return voyage from New-York to Liverpool, \$15,000 on cargo and proceeds, and \$5,000 on freight, outward and homeward, with different rates

(a) *Routledge v. Burrell*, (1 H. Bl. 254.) *Oldman v. Bewicke*, (2 H. Bl. 577, 1 n.) *Tarleton v. Staniforth*, (5 T. R. 695.) *Wood v. Worsley*, (6 T. R. 710.) *Jefferson Ins. Co. v. Cotheal*, (7 Wend. 72.)

of premium on each subject and voyage, there are no less than six contracts, as truly distinct, as if each were made the subject of a separate policy.^(a) As I am treating solely of the form of the policy, an explanation at this time of the legal consequences and effects of these different modes of insurance would be a violation of the method I wish to observe.

§ 24. A policy of insurance, when executed, like all other contracts, may not only be cancelled by the consent of the parties, but is subject to any change or modification of its terms that they may choose to adopt. The substituted or additional contract may either be made by an alteration in the policy itself, or by a separate instrument; but in all cases it must be attested by the same evidence as the original contract. Whatever may be its character or object, it appears to be necessary that it should always be signed by the insurer; and when it alters the risks to the prejudice of the assured, or imposes upon him a new obligation, if contained in a separate instrument, his signature is also requisite. If the change be made with his assent, by an alteration in the policy, it would probably conclude him, without his signature. A memorandum on the back of the policy is the most usual form of an agreement for the alteration of its terms; and according to the practice and the decisions in England, the assent of the insurer is in all cases sufficiently proved by the subscription of his initials.

When an alteration is made in the body of the policy by the assured, without the assent of the underwriters, if it change the sense or affect in any degree the substance of the contract, it renders the

(a) Code de Com. Art. 335. Pardessus, n. 798.

whole instrument void, whatever may have been the object or motives of the assured in making the change, and in whatever mode it is effected, whether by an erasure, an interlineation, or an addition in a blank space. In the emphatic language of the judges, it *destroys the policy*. When the change is made with the intent that it shall bind the underwriters without their consent or knowledge, it is a positive and highly criminal fraud; and when it is made with the design and expectation of obtaining the consent of the underwriters, although it will be binding on those whose consent is properly given, it equally annuls the contract as to all whose assent is withheld or refused. The law is otherwise stated by Mr. Phillips; but his position that "the introduction of a new clause into a policy after it is signed *bonâ fide*, and without any fraudulent purpose, but with the intent that the underwriters should consent to it, does not avoid the policy," (a) is erroneous in principle, and is contradicted by the decisions. There is no exception to the rule that a material alteration made by the one party without the consent or authority of the other, extinguishes the life, by destroying the identity, of every contract in writing; and the rule is founded in reasons of public policy too manifest and cogent to permit its change or relaxation. Hence, when the assured, without a previous authority in writing from the underwriters, but with the design of obtaining their consent, makes a material alteration in the policy, he does so at his own risk; the necessary effect of the alteration is to abolish the old contract and substitute a new, that can only be valid when adopted by the insurers. If their consent be

(a) 1 Phil. 40. Vide Note XV.

withheld, the whole instrument is a nullity. The only safe course for the assured who desires a change in the terms of his contract, is to submit the proposed alteration to the underwriters, in a separate instrument, that will be binding on those who consent to subscribe it, without varying the liability under the policy of those who refuse. When the alteration in a policy is wholly immaterial—when the words introduced are merely explanatory, and do not at all enlarge or vary the legal import of the original terms to which they apply, the contract retains its identity, and consequently, its legal force; the assent of the underwriters, in such a case, is wholly unimportant. Those who assent, are bound by the policy as altered—those who dissent, by its original form; but the liability of both classes is precisely the same, and the distinction between the two contracts, where a suit is commenced, consists not in the nature or extent of the relief, but solely in the form of declaring.

§ 25. Thus, where a policy contained a liberty to the vessel insured “to sell, barter, and exchange goods at any of the ports to which, under the terms of the policy, she might proceed during her stay;” and the plaintiff, fearing the original words might be insufficient, introduced in the policy the words, “and trade,” after the words “during her stay,”—and then presented the policy to the various underwriters for their consent to the alteration, and some of them gave their consent by signing their initials, but others, and amongst them the defendant, refused—and upon a motion for a new trial, it was insisted for the defendant that the alteration avoided the policy. It was held by the court that the contract was unchanged, and the defendant still liable,

upon the grounds that it was clear upon the face of the policy that the alteration was immaterial, and that the defendant would have been liable had no such words been introduced. That the case, therefore, was not governed by the reasons of prior decisions, in all of which the judges had referred to the materiality of the alteration as an essential circumstance. Here the alteration was immaterial, not changing the nature of the contract or altering at all the risks insured ; and consequently, it could not operate to vacate the policy. The underwriters who had given their consent by signing their initials, were bound by the instrument as altered—those who refused, by the policy as it stood at first.(a)

§ 26. In all the decided cases, in which a material alteration has been held to avoid the policy, the alteration was made by an erasure, interlineation, or addition in the body of the policy ; but when the alteration is made by words written in the margin, leaving the terms of the policy unchanged, I see no reason to doubt that it produces the same effect. Words thus written, we have already seen, although not attested in any other manner than by the signature of the insurer to the policy itself, are considered an integral part of the contract ; and hence, the danger of fraud from their insertion in the margin, is exactly the same as from their introduction into the body of the policy. In both cases, they equally bind the insurer, unless he can positively show that they formed no part of the instrument, when it was executed. It is proper, however, to add, that strong doubts have been expressed by an eminent judge,

(a) *Sanderson v. Symonds*, (1 Brod. and Bing. 426 ;) vide also *Sanderson v. McCulloch*, (4 Moore, 5.) Note XVI.

whether an alteration made without fraud by writing in the margin of the policy, or by an endorsement, ought in any case to be construed as affecting the integrity and validity of the original contract; (a) and the doubts, if limited to an unsigned memorandum on the back of the policy, seem highly reasonable. I venture also, with little hesitation, to express the opinion, that where a new clause, whether written in the margin or endorsed, has a new date affixed to it, subsequent to that of the policy, it should never be construed—where there is no alteration in the body of the instrument, as destroying the identity of the contract, since the invalidity of the alteration, when not signed by the insurers, is then apparent on its face, and hence the possibility of fraud is excluded.

§ 27. Although the assured, by an unauthorized alteration, may deprive himself of all remedy under the policy, he has no right, even in cases exempt from fraud, to consider the contract as wholly rescinded, so as to entitle him to demand a repayment of the premium. When the contract is yet imperfect and inchoate, the assured, by preventing the inception of the risks, as will hereafter be explained, may prevent it from becoming operative, and in effect dissolve it; but in no other case, can he release himself by his own act from his own obligations. (b)

§ 28. In the United States, there is no restriction on the right of the parties to alter their original contract at any time, and in any manner they may deem expedient; but in England, although certain alterations are permitted to be made without the

(a) *Richardson, J., in Forshaw v. Chabert*, (6 Moore, 369.)

(b) *Langhorn v. Cologan*, (4 Taunt. 330.) Note XVI.

addition of a stamp, those that seem the most material, if unstamped, are wholly invalid. The 13th section of the act of parliament^(a) before referred to, provides that "the act shall not extend to prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance duly stamped, after the same shall have been underwritten, or to require any additional stamp by reason of such alteration, so that such alteration be made *before notice of the determination of the risks* originally insured, and the premium, or consideration originally paid or contracted for, shall exceed the sum of 10s. per cent. on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by the act, (12 months,) or that no additional or further sum shall be insured by reason or means of such alteration."

§ 29. This section has been liberally construed by the English courts, and the substance of the decisions, in conformity to my design to exhibit a full view of the English law, as well as of our own, is necessary to be stated.

The words of the section, "*before notice of the determination of the risks originally insured,*" are construed to refer according to their usual and appropriate sense, to a termination of the risks, either from the loss or the safe arrival of the subject insured, and not to be applicable to a determination of the insurance from any other cause. Thus, where the vessel insured is warranted to sail on or

(a) 35 Geo. III. c. 63, § 13. 1 Park, 8th ed., 40.

before a given day, the extension of the time of sailing, or the cancelling of the warranty by a subsequent agreement, is not an alteration requiring a stamp, although made after the day had passed, and the policy therefore had become void by a non-compliance with the warranty. The insurance, when the agreement was made, was in truth at an end ; but it was so from a non-inception of the risks within the period limited by the policy, not from their termination within the meaning of the statute.(a) A mere intention to change the voyage is not a determination of the risks within the statute. Thus, where a vessel was insured from one port to another, and whilst she was detained during the voyage, in a port of necessity, a new agreement was made, changing her port of destination ; a new stamp was held not to be necessary ; for, although the assured meant to determine the risks by changing the voyage, his intention, when the agreement was made, was yet unexecuted ; and had the underwriters withheld their consent, might have been abandoned. The agreement, therefore, as made before an actual termination of the risks, was valid without a stamp.(b) It is, however, plainly to be inferred, from this decision, that an actual change in the voyage, after its commencement without a previous authority from the insurers, is a determination of the risks within the statute, and consequently a subsequent agreement intended to sanction the change without a stamp, would be ineffectual.

(a) *Kensington v. Inglis*, (8 East, 273.) *Ridsdale v. Sheddon*, (4 Camp. 107.) Note XVII.

(b) *Ramsbottom v. Bell*, (5 M. & S., 267.) Vide also, *Brocklebank v. Sugrue*, (1 B. & Al. 81.) Note XVII.

§ 30. This inference is greatly strengthened by a subsequent decision. A vessel that after she had commenced her voyage was discovered to be so much overloaded as to render it dangerous to proceed, put into an intermediate port to unload a portion of her cargo, and by a memorandum endorsed on the policy, the underwriters consented to the act. It was insisted that this agreement was void for want of a stamp, upon the ground that the risks were determined by the unseaworthiness of the vessel when she began her voyage. It was, however, held by the court, that under the circumstances, there had been no breach of the implied warranty of seaworthiness, and consequently the risks not being determined when the agreement was made, it was effectual without a stamp. Had the court adopted a different construction of the implied warranty, it is evident, that they would have held the memorandum to be void. The expressions, therefore, in the case first referred to, that the words of the statute refer exclusively to a termination of the risks from the loss or safe arrival of the subject insured, seem to have been too limited. The statute excludes only the cases where the insurance is determined before the inception of the risks, and embraces all where the policy is avoided by a subsequent act. (a)

§ 31. If an alteration of the policy introduce a change of the subject insured, a new stamp is indispensable, for the proviso of the statute, "so that the thing insured, shall remain the property of the persons insured," necessarily implies a continuance of the identity of the subject, as well as of the

(a) *Weir v. Aberdeen*, (2 B. & Ald. 320.)

ownership,(a) but the identity of the subject is not changed merely by a change of the words of description, so that when the goods insured are described in the policy by particular marks, a subsequent agreement by which the marks are altered or withdrawn, is not necessary to be stamped. It is properly an alteration of a "condition" of the policy, not of the subject, and as such, is permitted by the express words of the statute.(b)

§ 32. Where the sole object of an alteration, is to correct a mistake in an existing policy by making its terms conform to the real intentions of the parties, it is not considered as a case to which the provisions of the statute were meant to apply, and consequently, to whatever subject it may relate, or in whatever terms it may be expressed, a new stamp is not required to give it validity. It is not a new contract; but an act to render operative that which already exists, and to which, as corrected, the original stamp was meant to be affixed.(c)

§ 33. It seems to have been decided by Lord Ellenborough, that a new stamp is not requisite, when the alteration is made while the policy is in the course of execution, and the insurance has not been completed by the subscription of the full sum intended to be covered, and from the language of the same eminent judge in another case, it may be inferred, that he did not consider a new stamp to be necessary, even when the policy has been completed, if at the time of the alteration, it had not attached on the subject insured. The views of his

(a) *Hill v. Patten*, (8 East, 373.) Note XVII.

(b) *Hubbard v. Jackson*, (4 Taunt. 169.) Note XVII.

(c) *Sawtell v. Loudon*, (5 Taunt. 359.) *Robinson v. Touray*, (1 M. and S. 217.) *Robinson v. Tobin*, (1 Starkie, 268.)

lordship probably were, that until the contract is perfected by the inception of the risks, it is so far under the control of the parties, that no alteration can properly be regarded as a new contract. It merely ascertains that, by which alone, from the commencement of the risks, the parties intended to be bound.(a)

§ 34. A material alteration in the terms of the policy, to which the underwriters have duly assented, when inoperative from the omission of a stamp, is yet effectual to avoid the policy. Although, the want of a legal form prevents it from being received as evidence of a new contract, it is yet regarded as a complete expression of the will of the parties to abandon their former agreement.(b) The abstract propriety and justice of this decision may well be doubted; certainly the intention of the assured in such a case, is not to abandon his original contract, otherwise than by the substitution of another, equally valid. His intentions in their nature, are entire, and when by operation of law a portion of an entire intent is defeated, it is consistent with principle and with analogy, to say, that the whole act to which the intent relates, should be declared invalid; an entire intent, should either be wholly executed, or wholly defeated. Its partial execution is of necessity unjust. It was never contemplated by the parties, and far from expressing, in all cases, it defeats their will. The true ground of the decision seems to have been, that a different construction would lead to frauds upon the revenue; and upon this its defence must be rested.

§ 35. By the act 54 Geo. III. c. 184, a lower rate

(a) *Hill v. Patton*, (8 East, 373.) *Robinson v. Tobin*, (1 Starkie, 268.) Note XVII.

(b) *French v. Patton*, (9 East, 351.)

of duty is imposed upon policies, when the voyage is from one port in the United Kingdom to another, than upon insurances to a foreign port. Hence, when, by a subsequent agreement, a foreign port is substituted for a domestic, as the port of destination, a new stamp is doubtless requisite to render the alteration valid, since otherwise, the revenue would be defrauded of the regular duty.(a)

§ 36. The act of 54 Geo. III. c. 144, contains some provisions, relative to alterations in a policy, to which it is proper to advert, and with stating them, I shall close this division of the subject. It is the same act to which I have already referred, as authorizing the stamping of preliminary agreements to insure, and providing for a return of the duty when a policy is executed in conformity to the agreement. The statute does not require, that the correspondence between the agreement and the subsequent policy shall be exact and literal; but declares that the allowance of duty shall be made "notwithstanding the policy shall contain matter explanatory of the contract, or shall vary therefrom in consequence of any error in the contract, whereby the insurance really intended shall not have been effected, or in consequence of the terms and conditions of the insurance having been afterwards agreed to be altered." I do not know that there have been any decisions upon this statute; but the words "terms and conditions" would doubtless receive the same construction, and probably be subject to the same exceptions, as in the 13th section of the act 35 Geo. III. c. 68, which we have already considered. That is, the act would be construed

(a) *Brocklebank v. Sugrue*, (1 B. & Ad. 81.) Note XVII.

to sanction only such variations from the original agreement, as if made in a policy, would be valid alterations under the former law, since it would be unreasonable to suppose it to have been the intention of parliament that the right of alteration, without subjecting the contract to a new duty, should be more extensive in the one case than in the other.

§ 37. All the essential requisites of a policy, all the particulars that must be found in every contract of insurance, whatever may be its local or accidental form, are enumerated in the general division of the subject, with the exception of the date, in reference to which a few remarks are necessary to be made. There are few written contracts in which the insertion of the day, month, and year of their execution and delivery, as expressed in the single word, *the date*, is not essential, none, in which it is of more importance than in a policy of insurance. The validity of the contract frequently depends upon the completeness and accuracy of the previous communications of the assured relative to material facts, and when a concealment of such facts is alleged, the question, whether they were known to the assured before the completion of the contract, is usually determined by comparing the time when they came to his knowledge, with the date of the policy. So, when an unreasonable delay in the commencement of the voyage insured is alleged, a delay amounting to a deviation, and consequently discharging the insurer, a comparison of the time of the actual sailing of the vessel, with the date of the policy, is indispensable. Nor are these the only cases in which a reference to the date may be necessary to settle a controversy. When there are several policies on

the same property and risks, by the general law on the continent of Europe and in the United States, by virtue of special clauses in the policy, they attach on the subject insured in the order of their execution ; and where the sums insured exceed in the aggregate the value of the subject, the policies subsequent in date are discharged wholly or partially in the inverse order of their execution, until the whole amount insured is reduced to a correspondence with the value of the interest meant to be covered.(a)

It is, however, to be borne in mind, that the date of the policy is only presumptive, not conclusive, evidence of the facts that it attests. By an exception from a general rule, for which it is not easy to account, when the date of an instrument in writing, whatever may be its character, does not correspond with the period of its actual execution and delivery, the error may be averred in pleading, and be shown by proof on the trial.(b) The decisions, however, only establish, that when the execution and delivery of an instrument are subsequent to the date, the error may be corrected ; when they precede the date, whether the necessary correction can be made in a court of law, is upon the authorities exceedingly doubtful.(c)

§ 38. It has been stated that all the clauses and stipulations which, in addition to those that are essential, are usually inserted in English and American policies, will be considered and explained in connection with the several subjects to which

(a) 1 Emerig. ch. 2, § 4, p. 41. Pardessus, n. 794.

(b) *Stone v. Bale*, (3 Levinz, 348.) *Hall v. Cazenove*, (4 East, 477.) *Jackson v. Bard*, (4 Johns. 230.)

(c) Note XVIII.

they will be found to relate. There is, however, a single clause that is proper to be mentioned now, as it is wholly unconnected with any other branch of the subject, and I shall not have occasion again to advert to it. It is that which provides that all disputes, relative to losses claimed under the policy, shall be submitted to the judgment of arbitrators mutually chosen. This clause, although of late years it has been wholly omitted, was formerly not unusual in the policies of London and New-York, and is still retained in those of Boston and Baltimore. It is, however, as now framed, of no value or use whatever; neither party can compel its performance, nor can its existence, and a refusal to comply with its terms, be alleged by either party to oust the jurisdiction of a court of law or equity; (a) yet, by naming the arbitrators, limiting their powers to the decision of questions of fact, and making the submission to their award a rule of court, the arbitration clause might not only be rendered effectual, but highly beneficial. The provision thus guarded, and made capable of execution, would not operate merely as a saving of time and expense, but such arbitrators as merchants and insurers would probably select, would be a far more intelligent and much safer tribunal than an ordinary jury. It is by such tribunals that nearly all mercantile disputes, not involving questions of law, are decided on the continent of Europe; and a long experience has demonstrated their utility. (b)

§ 39. The most general division of insurances is

(a) *Mitchell v. Harrison*, (2 Ves. jr., 129.) *Thompson v. Charnock*, (8 Term, 139.) *Kill v. Hollister*, (1 Wils. 129.) Note XIX.

(b) Note XIX.

that of insurances *properly* so called, or insurances upon interest, which are alone embraced in the definition that has been given, and insurances *improperly* so called, in which the party nominally assured having no interest in the subject exposed to hazard, the contract, although, in form, a policy, is, in truth, a wager. The term insurance, by its own force, implies the provision of an indemnity for a contingent loss, and hence it is only by a perversion of its meaning that it is applied to a contract of which the object is not security, but gain. The two contracts, the wager and the indemnity, resemble each other in their extrinsic form, but differ radically in their tendency, as well as in their objects. The first, as a legitimate and highly beneficial contract, has eminent claims on the protection and encouragement of the law. The second, deserves no other character than that of gaming on an extensive scale; nor is there any species of gaming more detrimental to the morals of the parties, or more hazardous to the interests of the state in which it is allowed. The existence of the contract is, in all cases, a direct temptation to the party nominally assured to desire and seek the destruction of the property of others; and his policy, on its face, when the country in which it is effected is engaged in war, and hostile capture, is a risk insured against—invites him to become a traitor to his own government, by giving intelligence to its enemies, and stipulates the payment of the sum insured, as the reward of successful and undetected treachery. No argument can be requisite to show that, in a well governed state, a contract leading to these consequences, instead of being enforced by law, should be strictly prohibited and

rigidly suppressed. It is as a crime, not as an agreement, that it merits to be treated.

The progress of legislation on the subject of wager policies has been somewhat singular. At a very early period they were prohibited, rather from a sagacious anticipation, than an actual experience, of their evil consequences. Subsequently the fears that dictated this early prohibition were disregarded, as we find them to have been practised and allowed in most of the countries of Europe, until, in process of time, the numerous frauds to which they gave rise, having demonstrated their pernicious tendency, the original prohibition, although at different periods in different countries, has been almost universally renewed. According to Benecke,^(a) it is in Portugal alone that wager policies are now fully sanctioned by law.

§ 40. In England it was, at one time, the established law that an interest in the subject insured, was, in all cases, necessary to be averred and proved in order to sustain the policy,^(b) yet, from an early period in the eighteenth century, the usage of wager policies seems to have prevailed, and they were at length recognized and enforced by the judges as legal contracts.^(c) Such, however, were the abuses and frauds that sprang from this ill-judged toleration, that, within a very few years, an act of Parliament was found necessary to restrain them, and by the 19 George II., c. 37, it was enacted that all insurances on ships belonging to the king or to any

(a) 1 Benecke, (Rossetti,) 334.

(b) *Martin v. Sitwell*, (1 Show. 255.) *Goddart v. Garret*, (2 Vern. 269.)

(c) *Assievedo v. Cambridge*, (10 Mod. 77.) *Depaiba v. Ludlow*, (1 Comyn, 361.) *Dean v. Dicker*, (2 Str. 250.) *Crawford v. Hunter*, (8 Term, 23.) 1 Marsh. 123-127,

of his subjects, or on any goods or effects laden on board such ships by way of gaming or wagering, should be absolutely void. It is unnecessary at this time to state more particularly the provisions of this salutary law, as when treating hereafter of the proper mode of describing and proving the interest of the assured, it will become my duty fully to explain them. It is to be regretted, that the act does not extend to foreign vessels, and contains other exceptions that greatly impair its utility.

§ 41. In the State of New-York, until the Revised Statutes came into force, in 1830, wager policies were considered to be lawful, the judges holding themselves to be bound by the authority of the latest decisions in England.^(a) The Revised Statutes,^(b) however, declare that "all wagers, bets or stakes, made to depend upon any gaming by bet or chance, or upon any bet, chance, casualty, or unknown or contingent event whatever, shall be unlawful; and that all contracts for or on account of any money or property, or thing in action so wagered, bet, or staked, shall be void." The prohibition is so general in its terms, that it might well be construed to embrace all insurances whatever; but to guard against this construction, insurances made in good faith, for the security or indemnity of the party insured, and not otherwise prohibited by law, are, by a subsequent clause, excepted from its operation.

In Massachusetts, in the first case in which the question was raised, gaming policies were held to

(a) *Juhel v. Church*, (2 Johns. Cases, 333.) *Abbott v. Sebor*, (3 Johns. Cases, 39.) *Buchanan v. Ocean Ins. Co.*, (6 Cowen, 318.)

(b) 1 Rev. Stat., 2 ch. p. 666, § 8, 9, 10.

be invalid, not only upon the authority of the early English cases, but upon grounds of morality and public policy, and such is now to be regarded as the established law in that state.(a) In Pennsylvania, not only are wager policies condemned, but the courts in the exercise of their judicial discretion, have established a rule as broad as the statutory prohibition of New-York, by declaring that no action can be sustained upon any bet or wager, whatever may be its character.(b) In Louisiana, where the provisions of the Code de Commerce have been substantially adopted, a policy not sustained by an actual interest would doubtless be adjudged invalid: and should the question arise in the courts of any other state than those already mentioned, there is little hazard in predicting that its decision would be controlled by the same rules of a just morality and sound policy that have governed the courts in Massachusetts and Pennsylvania. The practice indeed of wager policies has ceased throughout the United States, and their entire illegality may now be fairly considered as universally established or admitted.(c)

Although the prohibition of wager policies in the United States, would seem to supersede the necessity of explaining their construction and effect, it yet renders it necessary to distinguish them carefully from a legitimate insurance, since a policy designed to cover an actual and insurable interest may

(a) *Amory v. Gilman*, (2 Mass. 1.) *Babcock v. Thompson*, (3 Pick. 446.)

(b) *Pritchett v. Insurance Company of North America*, (3 Yeates, 464.) *Craig v. Murgatroyd*, (4 Yeates, 161.) *Adams v. Penn. Ins. Co.*, (1 Rawle. 107.) *Edgell v. M'Laughlin*, (6 Whar. 176.)

(c) Note XX.

be so framed as to defeat the intent of the parties, and incur the imputation and penalty of a wager. (a) It is for this reason, and because wager policies are still partially allowed in England, that I shall find it necessary in the progress of these Lectures, as I have already intimated, to recur to the subject with a view to its full explication.

§ 42. Insurances in reference to the subjects upon which the policy attaches, are divided into insurances upon the vessel, and insurances upon the cargo or goods. It is true that various interests, besides that of actual ownership, connected with, or growing out of these subjects, such as freight, profits, commissions, &c., may be the object of an insurance and supply the measure of the indemnity to which the assured is entitled, but in all cases the vessel or cargo, or both, constitute the subject to which the risks of the policy directly apply, and from the loss of which the claim for an indemnity must arise.

§ 43. In respect to the commencement, duration, and termination of the risks, insurances are divided into insurances upon the voyage, insurances upon time, and insurances in which the elements of time and voyage are combined. An insurance upon the voyage is when a port of departure where the risks are to commence, and a port of destination at which they are to end, are named, or sufficiently defined in the policy. In an insurance upon time, the risks have no relation whatever to a voyage, but begin and terminate upon certain days named in the policy. Within the period thus defined the policy is in

(a) *Kulen Kemp v. Vigne*, (1 Term, 305.) *Tasker v. Scott*, (6 Taunt. 234.) 1 *Benecke*, (Rossetti,) 135. 335.

force and it expires when the time has elapsed, without regard in either case to the actual situation of the vessel. In an insurance upon voyage and time, although the risks relate to a certain voyage described in the policy, yet it is upon the lapse of time, that their commencement and termination upon that voyage, is made to depend. As, where a vessel is insured for one year, beginning on a certain day, on an outward and return voyage from New-York to the East Indies.

§ 44. The last division of policies to which I shall now advert, is that of *open* and *valued*, a distinction that relates solely to the mode of estimating and proving the interest of the assured in the event of a loss. A policy is *open* that contains no declaration of the amount of the interest of the assured, and which, consequently casts upon him the burthen of proof when he claims an indemnity. It is *valued* when the parties having agreed upon the value of the interest insured, in order to save the necessity of further proof, have inserted the valuation in the policy, in the nature of liquidated damages.

The preceding definitions are probably sufficient for the purpose for which they have been introduced. The terms to which they relate are of constant and necessary use, and it is expedient to have a general understanding of their meaning and application, before we reach those branches of our subject in which their further explanation and development will be necessary.

PROOFS AND ILLUSTRATIONS.

NOTE I.

P. 59, § 2. It is stated by Pothier, that there are five essential requisites in every contract of insurance. 1. The subject insured. 2. The risks to which the subject is exposed, and which the underwriter agrees to assume. 3. A fixed or indeterminate sum to be paid by the underwriter in the event of a loss from the perils insured against. 4. The sum which the assured gives, or binds himself to give, to the insurer as a compensation for his undertaking the risks. 5. The consent of the contracting parties in relation to all the subjects enumerated. (*Pothier*, n. 10.)

This statement agrees substantially with the division that I have adopted, except that it omits the voyage or period of time for which the insurance is made—an omission for which it is impossible to account, as the subject omitted is certainly of the *essence* of the contract—upon any other supposition than that, this accurate jurist considered the commencement and duration of the risks, which depend upon the voyage or period of time, as virtually included in a proper description of the risks themselves. This supposition is logically true, but there are many reasons that render it advisable to consider the subjects separately.

Millar, who is usually correct in his definitions, and whose work is advantageously distinguished by its lucid method, says, that every policy must settle the following particulars. 1. The person in whose favor the insurance is made. 2. The subject insured, whether house, life, ship, goods, or freight. 3. The sort of danger from which the

subject is warranted. 4. The consideration or premium given by the assured, and 5. The subscription of the underwriters, and the place and date of each subscription. His first and fifth divisions may be referred to the same category, namely, the parties to the contract, and he has omitted the amount insured and the duration of the insurance. The latter, it appears, from his subsequent remarks, he considered as included in his third article; but the omission of the former is unexplained, and must be imputed to inadvertence. (*Millar on Insurance*, p. 34, 35.)

Marshall enumerates ten usual requisites of the policy; but he includes in the enumeration several—the stamp, the name of the ship and master, the powers of the assured in the case of misfortune, and the common memorandum—that do not belong to the essence of the contract, and has omitted the amount insured. (1 *Marsh.*, 306. 337.)

NOTE II.

P. 61. "*Expression of an opinion.*" The single case referred to in the text, is that of *Smith v. Odlin*, (4 *Yeates' Penn. Rep.* 468,) in which it is said by Mr. Phillips, that C. J. Tilghman "expressed a doubt whether a valid insurance could be made otherwise than in writing," (1 *Phillips*, 8,) but the language of the Chief Justice as reported, contains no intimation whatever of his opinion. His words are, "As to the validity of a parol insurance, I do not mean to give an opinion, because I do not think it necessary for the decision of the point before the court." He then proceeds, however, as the organ of the court, to pronounce a decision, which was *virtually* a decision, that such an insurance is valid. The question in the case was, whether the plaintiffs, as assignees of one Yard, a bankrupt, were entitled to a premium of insurance, which the bankrupt in his accounts with the defendant had charged against him, and this question the court decided in their favor upon the following grounds: "Taking the evidence altogether," (the Chief Justice says,) "I think it leads to the conclusion, that Yard was to keep Odlin indemnified from the risks mentioned in the writing signed by Odlin. This he might do, either by un-

derwriting a policy himself, or by procuring others to underwrite. If he did not do one or the other, Odlin might support a special action on the case against him. Yard being thus responsible, there is no reason why he should not retain the premium, which was the price of his responsibility."

If a parol agreement to underwrite a policy, or to procure it to be underwritten by others, be valid, not merely to the extent of making the party liable for all losses that the policy, if effected, would cover, but of entitling him *in all events* to retain the stipulated premium, the distinction between such a contract and an insurance by parol, is purely verbal. The right and liabilities of the parties under both contracts are identical, and the only difference is, not in the substance of the agreement, but in the form of action founded on its breach. The judgment of the court, therefore, although they chose to distinguish the questions, was in effect a decision that a parol insurance is valid: but the propriety of their decision upon the grounds stated, is more than questionable. An agent who has failed to procure or make an insurance, according to orders or agreement, although personally liable to his principal in the event of a loss, is certainly not entitled, when no loss has occurred, to charge his principal with a premium that he never paid or earned. He cannot found a claim on his own neglect. The conclusion therefore of the court, that because Yard would have been responsible for a loss, he had therefore a right to recover or retain the premium, was unsound in principle, and unwarranted by the decisions. The decision of the court can only be sustained on the ground, that a parol agreement to insure by subscribing a policy, is *per se* an insurance, and the execution of a written policy wholly immaterial; a very doubtful position, even were a parol insurance valid, and quite untenable, if otherwise.

NOTE III.

P. 62, § 5. Although upon the principles of the civil law, as applied to similar contracts, an oral agreement to insure, it is admitted by Emerigon, (1 *Emerigon*, ch. 2, sec. 1, p. 26, 27,) is certainly valid; yet, the usage of a written instru-

ment appears to have prevailed upon the continent of Europe from the earliest period, and so far as the evidence extends, was always held by the tribunals, to be essential to the validity of the contract. The fourth Ordinance of Barcelona, that of 1484, (*Capmany. Consulado, Apend. p. 83. Ordin. de Barcel, c. viii. Casaregis, 183. 2 Boucher, 474,*) expressly enacts, not only that the contract shall be reduced to writing; but that the instrument shall in all cases be executed before, and attested by, a public notary, declaring all insurances otherwise made to be wholly void. The Ordinance of 1458, (*Capmany. Apend. 72. Ordin. c. iv.*) contains similar provisions, which are so expressed as to render it plain, that the usage of a written contract had before existed; the object of the enactment being to authenticate in a more solemn manner its actual execution. The Ordinance of 1484, was appended to the first printed editions of the Consolato.(a) (1 *Emerigon, Pref. p. 12. Casaregis il con. p. 5. Discou. iv. n. 15, 16, p. 22.*) It is frequently spoken of, and quoted as an integral part of that compilation, and from the manner in which it is constantly referred to by Cleirac, Valin and Emerigon, it seems to have been regarded by them as of equal authority. Hence there is the strongest reason to believe that its essential provisions, so far as they were not at variance with local ordinances, were adopted by usage in every country of Europe in which the Consolato was received as law.

(a) Casaregis, in that passage of his fourth discourse which is referred to in the text, contends that the Ordinance of Barcelona of 1484, being purely local in its origin and intentions, was not entitled to the force of law in other countries and cities, except so far as its provisions were proved to have been sanctioned by actual usage, "*nisi eas de consuetudine receptas fuisse probatum fuerit.*" He admits however, that the commercial Tribunal of Rome, (*Rota Romana,*) had decided otherwise in many cases, holding that the ordinance had the force of positive law in every country of Europe—"esse in-omnibus mundi partibus attendendum ac observandum." The source of the error he states to have been the publication of the ordinance in the first printed editions of the Consolato, which led to its being considered as of equal authority. The same cause must doubtless have led to a very general incorporation of the provisions of the ordinance, into the usages of every country in which the Consolato was received.

The author of "Le Guidon," indeed, says, that verbal contracts to assure had formerly (*anciennement*) been used in France, but adds that they depended for their execution solely upon the good faith of the insurer, and that in his own time not only were unwritten agreements universally forbidden, ("*prohibets en toutes places*,") but that it was essential to the validity, even of the written contract, that it should be passed before a *public notary*, (*Cleirac Us et Cout.* p. 187, 188.) This is direct evidence that the provisions of the Ordinance of Barcelona were followed in France; and Cleirac, in his note on the article, seems to refer to the ordinance as the origin of the rule.

The ordinance, therefore, of Louis XIV., in declaring that "La Police d'Assurance sera redigé par *écrit* et pourra être fait sous signature privée," (*Ordonnance, &c., tit. 6, art. 2. 2 Valin, 29.*) so far from creating for the future the necessity of a written contract, modified the rigor of the ancient law, in dispensing with a notarial attestation, and authorizing a *private* execution of the policy by the parties. The opinions of Valin and Pothier, stated in the text, that this provision of the ordinance is not imperative, but that an oral contract is valid in itself, and in special cases would be enforced by the tribunals, is strenuously denied by Emerigon, who, upon reasons that seem entirely satisfactory, arrives at the conclusion that a verbal insurance is wholly void. It is remarkable that it is not stated, either by Valin or Pothier, that any decision had ever been made in conformity to the opinion which they express, (1 *Emerigon, ch. 2, sec. 1, p. 26, 27. Vide also Pardessus des Assur. ch. 2, n. 792.*) *Kuricke de Asseurat, Fascic*, p. 833, considers a written instrument as necessary to the existence of the contract. "*Requiritur ad existentiam instrumentum assecurationis.*" His testimony is conclusive as to the opinion and usage of Northern Europe.

The ordinances of Florence, Antwerp, Philip II., Genoa, Middleburgh, Rotterdam, Amsterdam, Prussia, Hamburg, Stockholm, and Bilbao, (2 *Mag. 4, 5. 23. 39. 43. 47. 65. 94. 128. 188. 211. 257. 421.*) all enjoin the use of written instruments; and those of Florence, Antwerp, Philip II., Hamburg and Stockholm, prescribe the form of the policy.

The French Code requires that the policy shall be dated on the day on which it is subscribed, shall mention the hour of the day—whether before or after noon—and shall contain no blank, and that it shall express the following particulars: 1. The name and residence of the person effecting the insurance, and his character of owner or agent. 2. The name and description of the vessel. 3. The name of the master. 4. The port of lading. 5. The port of departure. 6. The ports or roadsteads in which the vessel is to trade and unload in the course of the voyage. 7. Those at which she has liberty to touch. 8. The nature and cost or valuation of the goods or other subject insured. 9. The period when the risks begin and terminate. 10. The time insured. 11. The premium. 12. The submission to arbitration when such is the agreement of the parties, and generally every other condition of the contract agreed on by the parties. It also provides that several distinct insurances may be included in the same policy, whether the difference consists in the subject insured, the rate of premium, or the persons underwriting. A subsequent article introduces these important exceptions: From the ports of the Levant and from the coast of Africa, and on a voyage to Europe from any part of the world, goods may be insured by ship or ships without any designation of the vessel or master, nor in such cases is a particular description of the goods required; but the policy must state the name of the consignee unless by a special clause the parties dispense with its insertion. (*Code de Com. liv. 2, tit. 10, art. 332. 3. 7.*)

The ordinance of Genoa requires that the name of the person procuring the insurance, shall be expressly mentioned in the policy before it is subscribed, and that if a blank space be left to be filled up with the name, the assurance shall be of no effect. (*2 Mag. 65.*)

The ordinance of Middleburgh, declares that no insurance upon corn, fruit, wines, oil, salt, herrings, sugar, quicksilver, butter, cheese, hops, syrup, honey, seeds, or any other perishable goods, or upon gold or silver, coined or uncoined, shall be valid, unless the subject insured is specifically described in the policy; but allows all other goods to be in-

sured under the general denomination of goods and merchandise. The same ordinance also requires that the name of ship, and of the master, and of the ports of lading and destination, shall, in all cases, be inserted in the policy. (2 *Mag.* 71, 72.)

By the ordinance of Rotterdam, where the insurance is on a voyage already commenced, the day on which the vessel sailed must be stated in the policy, unless the assured has no certain information of the fact, and then his want of knowledge must be expressed in the policy, otherwise the insurance is void.

By the same ordinance, gold and silver, diamonds and other precious stones, and munitions of war, cannot be insured under the general denomination of goods and merchandise, but must be expressly mentioned in the policy. (2 *Mag.* 89.)

The names of the ship and master, if within the knowledge of the assured, must be expressed in the policy. Also the ports of lading and discharge, and the place where the risks are to commence, when it is different from the port of lading. The policy is void if any facts required to be inserted are omitted. (2 *Mag.* 94.)

The provisions of the ordinance of Amsterdam, are substantially the same as those of Rotterdam. (2 *Mag.* 128. *Ordin. Art.* 23.)

In Prussia, the policy must specify the names of the contracting parties, and whether they contract as principals or agents, the name and residence of the master, the name and tonnage of the ship, the ports of lading and discharge, and all at which the vessel is to touch in the course of her voyage. Gold and silver, whether coin or jewels, perishable goods and those liable to damage by leakage, must be specifically insured. The insurance may be made in general terms when the assured has no knowledge of the nature of the goods or of the name and destination of the ship; but the goods must not be prohibited and the assured's want of information must be stated in the policy. (2 *Mag.* 189. *Ordin. Art.* 3.)

The Ordinance of Hamburgh declares that the policy shall expressly mention, 1. The name of the person

making the assurance; but when the parties so agree, this may be omitted and the policy filled up to the bearer. 2. The subject or thing insured; but the party insured is not bound to state whether the goods are his own or the insurance made on his own or a stranger's account. 3. The day on which the vessel sailed from her port of departure. 4. The ports of lading and discharge. 5. The names of the ship and master. 6. The premium and its rate, stating the name of the broker procuring the insurance. (2 *Mag.* 212.)

The Swedish Ordinance enacts, that the policy shall be printed, and prescribes its form, and declares that in the blanks of all printed policies shall be specified, 1. The name of the party insured; but where the insurance is made by an agent, he may either insert his own name or that of his principal. 2. The things insured, and their value in money. 3. The names of the ship and master. 4. The places of lading and discharge, and the whole voyage of the ship from her port of departure to her port of final destination. 5. The time when the ship is to sail, or actually did sail. 6. The payment of the premium. (*Ordinance of Stockholm, Art. 4. 2 Mag. 257.*)

The Ordinance of Bilbao enacts, that the policy shall contain, 1. The names and residence of the assured and the assurers. 2. The value of the goods or other subject insured, and whether the insurance be made by the assured on his own account or as agent. 3. The names of the ship and master, the port of lading, that of departure, and of final destination, and the several ports or places where the vessel is at liberty to touch. 4. The sum insured by each insurer. 5. The premium, its rate, and whether paid or secured to be paid. 6. The date, mentioning the day and hour, and the period when the risks are to commence, and when they are to terminate at the port of destination, (*Ordinance of Bilbao, 2 Mag. 407.*)

The 11th section of an act of Parliament, passed in the 35th year of George III., (35 *George III., c. 63.*) the principal act imposing a duty on marine insurance, and requiring a stamp, enacts, "That every contract or agreement which shall be made or entered into, for any insurance, in respect

whereof any duty is, by this act, made payable, shall be engrossed, printed, or written, and shall be deemed, and called *A Policy of Insurance*; and that the premium, or consideration in the nature of a premium, paid, given, or contracted for, upon such insurance, and the particular risk or adventure insured against, together with the names of the subscribers and underwriters, and sums insured, shall be respectively expressed or specified in or upon such policy, and in default thereof, every such insurance shall be null and void to all intents and purposes whatever." The twelfth section enacts, "That no policy of insurance upon any ship, or upon any share or interest therein, shall be made for any certain time longer than twelve calendar months; and every policy which shall be made for any longer term, shall be null and void to all intents and purposes."

NOTE IV.

P. 65, § 7. By the usage of all the insurance companies in the city of New-York, the application for insurance is made in writing. When it is accepted, and the sum insured, and the rate of premium inserted, it is signed by the applicant and the president of the company, and constitutes a perfect contract. A printed form with the necessary blanks is used for the purpose, which is in these words:

"Insurance is wanted by _____
for account of _____
loss if any payable to _____
_____ on _____

Shipped or to be shipped on board the _____
at and from _____

Premium _____ per cent.
Binding _____ President.
Applicant.

New-York _____ 184.

The premium note is not given until the delivery of the policy. The usage of a written application is similar, it is

believed, in the other states of the Union ; but possibly with some variance in the form.

NOTE V.

P. 65, § 8. It is stated by Dr. Pohls, (*See-Assecuranz, Rechts. Ers. Theil. p. 135,*) that for the reasons given in the text, policies on the continent were formerly required to be signed by both parties ; but he refers to no authority in support of this assertion, and I have found no reference to the existence of such a general usage in any other writer. None of the foreign Ordinances that I have had the means of examining, enact that the policy shall be signed by the assured ; nor do the forms of the policies, which some of these Ordinances prescribe, render it necessary. (*Sup. Note 3.*) The same writer, while he admits that verbal insurances were formerly in use, says that the rule must now be considered as established, that the contract must be in writing. (*Ib. p. 134.*)

Emerigon says, that by the established usage in France, the policy was never signed by the assured, and that it was quite unnecessary that it should be. When Emerigon wrote, it was not the custom in France to advance the premium, and accordingly the forms of the policy that he has given, contain no receipt of its payment ; but he says, that should the assured refuse to pay, the original memorandum of the broker, or an extract from his books, would be sufficient evidence to enable the insurer to recover. (1 *Emerigon, ch. 2, § 4, p. 48. Ch. 2, § 3, p. 34 and 38.*) Pardessus seems to be of opinion, that both the usage and the law in France on this subject are unchanged. (*Pardessus, n. 793. 796.*)

We are told, however, by Boulay du Paty, (3 *Boulay du Paty*, 253, 4, 5,) that under certain provisions of the Code de Commerce, (*Art. 109,*) and of the Code Civil, (*Art. 1325,*) it is now necessary to the validity of the contract, that the policy, whether registered on the books of a notary or broker, or executed by the parties without the intervention of a public officer, should be signed by both parties, and he cites a decision of the "Cour Royale" of Aix, to that effect. But he adds that this necessity does not exist when the pre-

mium is paid in advance, for as the contract then becomes unilateral, containing stipulations only on the part of the underwriters, the signature of the assured is wholly unimportant. "*Au moyen du paiement de la prime, l'engagement que prennent les assureurs est unilateral: des lors il est fort indifférent que l'assuré signe ou non la police d'assurance, puisqu'il n'y prend aucun engagement.*"

NOTE VI.

P. 66, § 10. *Kohne v. The Insurance Company of North America*, (1 Wash. C. C. R. 93.) This was an action of trover for the recovery of a policy of insurance. It appeared in evidence, that the plaintiff had directed his agent to effect an insurance on goods on board the ship Gadsden, from Newport, Rhode Island, to Port Passage in Spain. The agent applied to the president of the company on Saturday, the 12th of October, 1799, and settled with him the terms of the insurance, but left the office before the policy was filled up. It was, however, filled up and executed a few hours afterwards, of which the president of the company gave him notice, mentioning at the same time that the company had received information that the vessel had been captured and carried into Halifax. This information appeared in a newspaper, published on the very day the insurance was made; but was not known to either party when the agreement was entered into, and the policy executed. On a subsequent day the agent called to deliver the premium note and receive the policy; but the company refused to deliver it to him.

One of the objections to the recovery of the plaintiff, was that the agreement for the insurance was inchoate, and that the company having heard of the loss before the delivery of the policy, had a right to retract; but Mr. Justice Washington, in his charge to the jury, considered the objection as entitled to no weight. There was no charge of unfairness, he told them, on the part of the agent. It was not pretended that he knew of the loss when he waited on the president and settled with him the terms of the contract. Every thing was then agreed upon, and although he did not wait

to receive the policy; yet immediately after he left the office it was filled up and signed by the president, and had been produced on the trial. The contract, therefore, was not inchoate, but perfected before notice of the capture by either of the parties. It will be seen hereafter that if the policy in this case had not been executed until *after* intelligence of the loss; yet, as founded on a prior agreement made in good faith, it would have been valid. The law in France agrees with our own. Pardessus says—“*La Police une fois signée la convention est irrévocable : l'assuré ne seroit pas plus le maître d'en refuser l'exécution, sous prétexte qu'il ne l'a agréé pas, que l'assureur ne le seroit de rayer sa signature avant que la Police ait été remise à l'assuré.*” (n. 796.)

Where a policy of the execution of which notice has been given is withheld, an action of trover is doubtless the proper remedy, and upon the trial it will not be necessary to give direct proof of the existence of the policy: the defendant will be concluded by the notice. The case of *Harding v. Carter*, was an action of trover, before Lord Mansfield, for the recovery of two policies, which the defendants, who were brokers, had given notice to the plaintiffs, that they had effected on his account, but which in fact were never executed. Lord Mansfield told the jury that the defendants were to be considered as the actual insurers, and that the defence set up that their letter to the plaintiffs had been written by mistake by a clerk, and that trover could not be maintained for that which never existed, could not avail them, since they could not be suffered to contradict their own representation. The plaintiff had, accordingly, a verdict for the amount of his interest, deducting the premium. (1 *Park*, 8th ed. 5.) (*Marsh.* 303.)

NOTE VII.

P. 67, § 61. The case referred to in the text, is that of *Motteux v. The London Assurance Company*, (1 *Atk.* 545.) There was not, however, an immediate decree for the payment of the loss, founded upon the evidence before the court; but Lord Hardwicke directed an issue, to determine, whether “the loss was a loss during the voyage,

and according to the adventure which was agreed upon, or intended to be insured," and in all cases where there is a dispute concerning the loss, or the liability of the insurer under a corrected policy is denied, this is doubtless the course that ought to be followed, and the final decree should be suspended until the facts have been ascertained by the finding of a jury.

In the case of *Perkins v. The Washington Insurance Company*, (4 Cowen, 646,) the bill was filed to compel the defendants to execute a policy against fire in conformity to an agreement to insure, made by their agent, or pay the loss; and the Court of Errors in New-York, on the reversal of the decree of the Chancellor, decreed, not that a policy should be executed, but that it should be referred to a master to ascertain and report the amount due for the loss, and that a decree for its payment should be entered upon the confirmation of the master's report. There was no dispute, however, in this case, as to the fact of a loss, or as to the liability of the company for its payment, upon the supposition that they were bound by the agreement of the agent. The case is a direct authority in support of the position in the text, that a court of equity, upon a bill for the specific execution of an agreement to insure, may decree a satisfaction.

The following case in Massachusetts, equally shows that the assured upon an unexecuted agreement to insure, has a remedy in an action at law. *M'Culloch v. The Eagle Insurance Company*, (1 Pick. 278.) The action was founded on an alleged agreement contained in the correspondence of the parties: the court were of opinion that the letters did not afford sufficient evidence of a contract binding on the defendants, but also held that had such a contract been made, the mere want of a policy would not prevent the plaintiff from recovering. The form of the action in this case was assumpsit, treating the agreement to insure as an actual insurance; but it seems to be necessary that the action should be special, stating as a breach, the refusal of the defendants to deliver a policy according to the agreement, setting forth the terms of the policy that ought to have been made, showing that the loss claimed would have been re-

coverable under it, and alleging as a special damage, that the plaintiff had been deprived of the remedy it would have given. And to entitle the plaintiff to recover, the plaintiff would be bound to give the same evidence as if the action had been founded on the policy; that is, he would be bound to show a compliance on his part, with all the conditions that the policy, if executed, would have imposed. I see no reason to doubt that such an action is maintainable, and where no discovery is sought, it is for very obvious reasons far preferable to a bill in equity, (*Harding v. Carter*, 1 *Park*, 8th ed. 5.)

It is implied in the observations of the text, and in the two preceding cases, that it can be no objection to the validity of a policy founded on a previous agreement, that it was executed after the occurrence, and with the knowledge, of a loss. This question has, however, been in England the subject of a solemn decision.

Mead v. Davison, (3 *Adolph. & Ellis*, 303.) The insurance was on the ship *Crisis*. The plaintiff and defendant were members of a mutual insurance society, called the British Association of London. The ship was proposed and accepted for insurance in February, 1829; but no policy was executed and stamped, until the 21st of October, in the same year. Before this time an average loss, for which the action was brought, had happened and had become known to both parties. No fraud was proved.

One of the objections to a recovery was that no action could be maintained upon a policy executed after a loss had taken place, within the knowledge of the parties; and upon the trial Lord Lyndhurst, C. B., nonsuited the plaintiffs on this ground. Upon a motion for a new trial, the counsel for the defendant, insisted that the question, whether a valid policy can be effected after both parties had a full knowledge of the loss, had never been decided, and that it was inconsistent with the nature of the contract that it should be entered into under such circumstances—that the insertion in the policy of the words, “lost or not lost,” made no difference, since by their established construction they refer only to a case where both parties are ignorant of the event. In reply to these positions, Lord Denman, in delivering the

judgment of the court, said that "the material question was, whether an assured can recover on a policy executed after the loss had occurred, and became known to both parties. Now the case of *The Earl of March v. Pigot*, (5 Burr. 2802,) referred to in the argument, is a direct authority in principle, in favor of the right to recover, if the loss was known to neither party at the time of effecting the policy. According to the same case, and indeed on the plainest general principles, if the loss had been known to the assured only, the policy would be void. But no case has determined that an underwriter who chooses to effect a policy, with full knowledge that the loss has actually happened, may not be bound by it. This conduct might indeed appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, viz., the payment of the premium, which may be regarded as a price actually given and received for the underwriter's indemnity against the contingency that has arisen. There is considerable analogy between this case and *Paine v. Miller*, (6 Ves. jun. 349,) decided in 1801, by Lord Eldon, who held the purchaser bound to perform his contract, though the house was burnt before the time appointed for conveying it. 'As to the mere effect of the accident itself,' said his lordship, 'no solid objection can be founded upon that, simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes.' (p. 352.) He also said, advertng to the case of annuities, where the purchasers have been compelled to pay the purchase money, though the grantor die before he has made a single payment, 'the party has the thing he bought, though no payment may have been made, for he bought subject to contingency.' So, in the present case, he bought and paid for the underwriter's promise to indemnify. If his ship had arrived, the underwriter would have kept the whole premium, though she has perished, he cannot be released from his agreement. Equity would have compelled him to execute the formal policy, whenever tendered to him. In voluntarily executing it, he has only performed a manifest duty, and cannot now retract the ob-

ligation." For some observations on this case, see post, Note X.

NOTE VIII.

P. 67, § 12. *The Ocean Ins. Co. v. Carrington*, (3 *Connect.* 567.) The action was brought for the recovery of a premium note given by the defendant, on a policy executed by the company, and the question was, whether the policy corresponded with the previous agreement, so that the defendant was bound to accept it. The material facts were these:—The defendant, Carrington, wrote to the company to inquire upon what terms they would make an insurance "on 26 horses and 20 oxen, on board the brig *Gleaner*, from Saybrook to the West Indies," saying nothing as to the valuation of the property, or the sum he desired to be insured. The company replied in these words—"The office will take the risk at 15 per cent, or at 10 per cent, with a warranty that the property was safe on the 7th of December last, but no partial loss is to be paid under 10 per cent." By the mail of the next day, Carrington replied—"We accept your terms with a policy filled, on 26 horses valued at 2,200 dollars, and on 20 oxen, valued at 800," and in this letter enclosed the premium note. The company on the following day forwarded by mail a policy "for \$3000 on stock, on the deck of the brig *Gleaner*," with this note in the margin "46 head of horses and oxen, valued at 3000 dollars." This policy, the defendant refused to accept, and immediately returned it to the company. The ground of this refusal was, that the horses and oxen were included in one gross valuation, instead of being *separately* valued, according to the terms in which he had accepted the offer.

Chief Justice Hosmer, with whom a majority of the judges concurred, in delivering the judgment of the court in favor of the defendant, and in commenting on his second letter, remarked:—

"This was a new proposal, which Carrington might presume the company would accept, but could not know it. The office had assumed no such obligation, as the office had not agreed to undrwrite a valued policy; neither had the de-

fendants agreed to receive an open policy. The minds of the parties had not met. It would be placing an undue stress upon the first words of the letter, 'we accept,' to consider this expression as concluding the contract. The underwriters, by the valued policy which they transmitted, recognized the new proposal in part, and if they had attended to their import, the same words would have convinced them that a separate valuation of the horses and oxen was proposed. The policy transmitted was not conformable to the proposition. The parties never did agree." Bristol, J., dissented from the other judges; but as he did not question the principle of their decision, but merely adopted a different interpretation of the defendant's second letter, it is unnecessary to give any extracts from his opinion.

In *Eliason v. Henshaw*, (4 Wheat. 228,) the rules applicable to all contracts, alleged to have been made by an offer from the one party, and its acceptance by the other, are laid down by Mr. J. Washington, with his usual precision.—"It is an undeniable principle, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open and imposes no obligation upon either." He then applies these principles to the facts of the case, and his remarks are added, as affording a clear and valuable illustration.

"In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same 9 dollars 50 cents per barrel. To the letter containing this offer, they required an answer by the return of the wagon by which the letter was despatched. This wagon was, at that time, in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate, by the usual length of time which was em-

ployed by this wagon in travelling from Harper's Ferry to Mill Creek, and back again, with a load of flour, about what time they should receive the desired answer; and, therefore, it was entirely unimportant, whether it was sent by that or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the *time* when the answer would be received, there was none as to the *place* to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

"It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing." The judgment of the court was, that no contract had been concluded between the parties, and that the jury in the court below ought to have been so instructed.

NOTE IX.

P. 68, § 13. The decision referred to in the text, was made in the case of *McCulloch v. The Eagle Insurance Company*, (1 Pick. 278.) The plaintiff wrote to the defendants on the 27th of December, to ascertain on what terms they would insure \$2500, on the brig Hesper and cargo, from Martinico to the United States. The defendants replied on the 1st of January, that they would take the risk at two and half per cent. This letter was received by the plaintiff on the 3d of January, on which day he wrote and put into the post-office his reply, requesting the defendants to fill a policy on the terms they had proposed. In the mean

time, however, the defendants, on the 2d of January, had written to the plaintiff retracting their offer and wholly declining the risk, but the letter did not reach him until his reply of the 3d had been sent. The vessel was afterwards lost. The question was, whether the correspondence of the parties constituted a valid contract. In delivering the judgment of the court, Parker, C. J., observed—"It is contended by the plaintiff, that the bargain was completed at the moment he wrote and put into the mail his letter, signifying his acceptance of the terms offered; and by the defendants, that the bargain was open until they should have received that letter, and that, in the mean time, they had a right to withdraw their offer. We adopt the latter opinion as the most reasonable. The offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendants, until the letter announcing the acceptance was received." The reasoning by which this opinion is maintained, is substantially this. That in no case can there be a valid agreement or promise, unless both parties are bound at the same time and during the same period of time—that the plaintiff in the case before them, was under no obligation to accept the offer when received, and even after he had accepted it, might have retracted it, by withdrawing his letter from the post-office, or, if this could not be done, by sending an express to the defendants to announce his refusal before the arrival of his letter. It was, therefore, certain, that as to the plaintiff, there was no contract by which he was bound until his acceptance was received, and it was a necessary consequence that there was a *locus penitentiae* open to the defendants during the same period. Until the plaintiff was absolutely bound they could not be. I shall make no present comments on this plausible reasoning, as a sufficient refutation of it will be found in a decision hereafter to be quoted. The Supreme Court of Massachusetts, quoted in support of their opinion the two cases of *Payne v. Cave*, (3 Term, 148,) and *Cooke v. Oxley*, (3 Term, 653.)

The first case, that of *Payne v. Cave*, seems hardly to be applicable. It merely declares that a bidder at a public auction, may retract his bid at any time before the hammer is struck upon his offer. It has never been doubted that an

offer to make a contract may be withdrawn, if before it is *accepted* the withdrawal be made known to the party making the offer, but this is far from proving that it may be withdrawn after he has decided to accept it. The second case, *Cooke v. Oxley*, is indeed directly in point. It not only supports the doctrine of the Supreme Court of Massachusetts, but goes much further, for it decides, that when a bargain has been proposed, and a certain time for closing it has been allowed, there is no contract even when the offer has not been withdrawn, and *has been accepted* within the limited period. To constitute a valid agreement, there must be proof that the party making the offer assented to its terms after it was accepted. But we have the high authority of Mr. Justice Bayley for saying, that this case is erroneously reported: were it otherwise, it will appear that as a precedent it has been overruled.

In *Humphries v. Carvalho*, (16 *East*, 45,) *Cooke v. Oxley* was cited as a conclusive authority in favor of the defendant, but in reply to the argument, founded on it, Mr. J. Bayley said that the question in that case arose upon the record, "and that a writ of error was afterwards brought upon the judgment, by which it appeared that the objection was, that there was only a proposal of sale by the one party, and *no allegation* that the other party had acceded to the contract." This averment, it will be obvious to all who are acquainted with the rules of pleading, was indispensable, and the objection therefore plainly fatal.

Even on the supposition that *Cooke v. Oxley* is correctly reported, its authority is directly overthrown by the decision of the same court, in *Adams v. Lindsell*, (1 *B. & A.* 681.) This was an action for non-delivery of wool, according to agreement. The defendants, by letter, offered to sell to the plaintiff a certain quantity of wool at a specified price, and on specified terms of payment, stating that they expected an answer by the course of the post, but by mistake directed their letter to a wrong county, and in consequence of this mistake, not receiving an answer as soon as they expected, they in the interval sold the wool. The plaintiffs, however, accepted the offer as soon as they received the letter containing it, and wrote an answer by the post of the

same day, which was received by the defendants the day after the sale. The judge, on the trial, held that the delay having been occasioned by the neglect of the defendants, the jury were bound to consider that the answer did arrive by due course of post, and that the defendants were therefore liable for the loss the plaintiffs had sustained by the sale. On a motion for a new trial, the counsel for the defendants, upon the authority of *Payne v. Cave*, and *Cooke v. Oxley*, insisted, that until the answer of the plaintiffs was received, even admitting it to have been received by due course of post, there was no binding contract between the parties, but until then, the defendants had a right to retract their offer, as they had done, by a sale to other parties. The court, however, disregarding the authorities cited, said that if such were the law, no contract could ever be completed by the post, for if the defendants were not bound by their offer, when accepted by the plaintiffs, until the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it, and so it might go on *ad infinitum*. The defendants must be considered in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs: and then the contract is completed by the acceptance of it by the latter.

The learned reporter, in a note to the case of *M'Culloch v. The Eagle Insurance Company*, (1 Pick. 283,) after quoting the case of *Adams v. Lindsell*, and admitting that had it been known in time, it might possibly have led the Supreme Court of Massachusetts, at least to suspend, if not alter their decision; yet suggests that there are perhaps material differences in the subject matter of the two cases of sufficient importance to warrant a different judgment. The first difference he states is, that in *Adams v. Lindsell* there was no notice of a revocation of the offer to sell. To this the reply is obvious. If an offer to sell be not in any sense binding on the party making it, until he has received notice that it has been accepted, whether it be revoked by some positive act rendering it impossible for him to complete the contract, as by a sale of the goods, or by a notice

to the opposite party, must be immaterial. According to this rule, whilst he is still ignorant of the acceptance of his offer, there is no legal obligation of any kind resting upon him, and his discretion in relation to the subject matter of his offer is therefore unlimited, and it was solely upon this principle that the Supreme Court of Massachusetts founded their decision. The more material difference, the learned reporter adds, is that a treaty respecting insurance is necessarily subject to contingencies while it is forming. The arrival of the vessel before an acceptance would certainly put an end to it; or the party, by a notice to the insurers, might revoke his acceptance before they received it. Admitting this to be true, it is also true that there is no supposable case in which a proposed contract is not subject to similar contingencies. Every offer is liable to the contingency of a rejection; in no case is the person receiving it bound to accept, and in all he may have valid reasons for rejecting it. It is equally plain that the right to countermand an acceptance if it exists in any case, exists in all. On the other hand, there are reasons of peculiar force why the contract of insurance should be held to be perfected by the act of the assured in acceding, by an immediate reply, to the terms proposed to him. Considering the agreement as then concluded, he will certainly omit to make any other insurance, yet should intelligence of a loss reach the insurers before his acceptance, if by a revocation of their offer the contract might be rescinded, his reasonable confidence in its fulfilment, a confidence induced by their acts, would subject him to an irreparable loss, and perhaps involve him in certain ruin. The learned reporter seems to have felt that in the case supposed it would be highly inequitable to deprive the assured of all remedy on the contract, and therefore intimates that so essential a change of circumstances, as the occurrence of a loss, might possibly give him a claim on the insurers; but it would be impossible for a court of law to sustain the claim upon any other principle, than that a contract proposed by letter is perfected by the acceptance of its terms. If the true rule be, that to constitute an agreement, notice of the acceptance of an offer must be received before it is revoked, the occurrence of a loss could never

prevent its application. On the contrary, the knowledge of the insurers that a loss had occurred, would furnish the best possible reason for the revocation of their offer. It might be considered as emphatically the case, in which the privilege reserved to them by the rule was meant to be exercised.

In a subsequent case in Massachusetts, *Thayer v. Middlesex Mut. Fire Ins. Co.*, (10 *Pick.* 332,) although the case of *McCulloch v. The Eagle Ins. Co.* was not overruled in express terms, yet the language of the court involves a plain renunciation of the principle on which it was founded. The action was brought upon an alleged agreement to insure certain buildings against fire and upon the facts, which it is unnecessary to state, the court arrived at the conclusion that the proposal of the defendants had not been acceded to by the plaintiff at the time the loss had occurred, and of course that "there was no contract of insurance, then subsisting between the parties." Chief Justice Shaw, in delivering the opinion of the court, after observing that an offer is not matured into a complete and effectual contract until it has been acceded to by the person to whom it was made, and notice thereof, either actual or constructive, given to the party making it, in a subsequent passage, says, "It may well be conceded, that when notice is to be given by mail, a notice actually put into the mail, especially if forwarded and beyond the control or revocation of the party sending it, may be good notice," evidently meaning that a notice thus put into mail, and beyond the control of the party, is valid as a *constructive* notice, so as to render the contract from that time complete and effectual—a rule substantially agreeing with that stated in the text, except that, I conceive, that an acceptance put into the mail from that time, perfects the contract, and that the mere possibility of its being withdrawn or revoked is not sufficient to impair its validity.

The language of Chief Justice Best, in the case of *Routledge v. Grant*, (3 *Car. & Payne*, 267,) may, on the first perusal, be thought inconsistent with the decision of the King's Bench in *Adams v. Lindsell*. He says, that where an offer is made, and a certain time allowed for its acceptance, it

may be revoked at any time before it has been accepted, unless there is an express stipulation binding the party not to retract, but this position does not at all contravene the judgment of the court in *Adams v. Lindsell*. That an offer may be retracted before it has been accepted, when there is no express stipulation to the contrary, was not in that case denied, but it was determined that the revocation to be valid must reach the person to whom the offer was made before he has accepted. There can be no revocation by an intermediate act which at the time was unknown to him.

The case of *Routledge v. Grant* afterwards came before the court of common pleas, on a motion to set aside the nonsuit, (4 *Bing.* 653,) and upon this occasion the Chief Justice, in the opinion that he delivered, made several observations that were doubtless intended to question and shake the authority of *Adams v. Lindsell*; but the two judges, (Burrough and Gaselee,) who concurred with him in refusing to set aside the nonsuit, did so upon the sole ground that there was a fatal variance between the proof and the declaration. Upon the first and principal question, whether the defendant, having given a certain time for the consideration of his offer, had any right, in the interval, to retract it, so as to prevent the consummation of the bargain by a subsequent acceptance of the offer, within the time allowed, they declined to express an opinion. It is a fair inference, that upon this question their views were opposed to those of the Chief Justice.

The most recent case in the English courts, is that of *Head v. Diggon*, (3 *Man. & Ryl.* 97,) which seems on the first inspection to establish the case of *Cooke v. Oxley*, and by a necessary consequence, to set aside the authority of *Adams v. Lindsell*. The facts, in evidence, were that the defendant had offered to sell to the plaintiff, a certain quantity of wool, at a certain price, and had given him three days for the consideration of the offer. That the plaintiff, in due season, notified his acceptance; but that the defendant then refused to complete the contract, alleging that the acceptance was too late, and that he had made an offer of the wool to another person. Upon these facts it was held by the court, that the plaintiff was not entitled to

recover ; but it is evident, from comparing the observations of Lord Tenterden, during the argument with his final opinion, that his judgment was chiefly founded on the erroneous form of the declaration, which instead of setting forth the facts—the offer, the time allowed for its consideration, and its acceptance within that period—was framed as upon an absolute agreement, made by the simultaneous consent of the parties. The case, therefore, only proves, that where a contract is made by the acceptance, within a limited time, of a previous offer, the declaration must be special.

From the marginal note of the reporter in the case of *Head & Amory v. The Providence Ins. Co.*, (2 *Cranch*, 167,) it might be inferred, that the acceptance by a company, of an offer to cancel a policy, is not binding upon the assured until it reaches his knowledge, but upon examining the opinion of the court, it will be seen that the true grounds of the decision were, 1st, That the offer was not so precise and definite as to be binding upon the assured. It was rather an inquiry than a proposal; and 2d, That the acceptance was not legal evidence of the assent of the company, as it was not signed by the president and secretary, who alone were authorized to subscribe its policies. The case, therefore, has no bearing upon the questions now under discussion.

The most important, and in relation to the law in the state of New-York, the most decisive case remains to be quoted. It is that of *Mactier's Adm'rs. v. Frith*, in the Court of Errors of New-York. (6 *Wend.* 104.) The opinion delivered by Mr. J. Marcy contains a more full and learned investigation of the principal questions connected with the subject, than is elsewhere to be found : and in the conclusions at which he arrived, the majority of the court, reversing the decree of the Chancellor, concurred. Mactier, the intestate, in a letter dated the 25th of March, accepted an offer made to him, by the respondent in a letter of the 24th of December previous, to purchase from him a large quantity of brandy at a stipulated price : but on the 10th of April following, and before his letter reached the respondent, Mactier died. The material questions were, first, whether the offer of Frith was to be considered upon the evidence as still open

and in force, when accepted by Mactier, and second, whether its acceptance by Mactier was sufficient *per se* to consummate the bargain, so as to be unaffected by his death before it reached the respondent. Upon the first question, which depended on a minute and critical examination of the facts of the case, it is unnecessary to give any extracts from the opinion to which I have referred. It is to the observations of the learned judge upon the second, that I would call the attention of the reader. He cites and examines the conflicting cases of *McCulloch v. The Eagle Ins. Co.* and *Adams v. Lindsell*, and he observes that they exhibit a contradiction in principle, impossible to be reconciled, and that the efforts of counsel to distinguish them upon the ground that the one was a contract of insurance and the other of sale, had wholly failed. I feel it a duty to transcribe the just and forcible remarks of the learned judge upon this topic, as they embody a principle which the mistaken and dangerous ingenuity of lawyers and judges has too often disregarded, although its strict observance, if the law deserves, or is ever to attain, the character of a science, is of indispensable necessity.

"A refinement," he observes, "which would distinguish between a contract for insurance and one for the sale of goods, in relation to the assent of the parties, might relieve us from the embarrassment which the different principles of these decisions are calculated to produce; but to apply such a distinction hereafter, would doubtless involve courts in a still more distressing embarrassment. Distinctions which are not founded on a difference in the nature of things, are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules, appealing to factitious reasons for their support, consequently difficult to be acquired and often of uncertain application. The two cases referred to, should have applied to them the same rule of law, and we are required to say what that rule is in deciding the case now under consideration."

The learned judge then proceeds to declare and justify his adherence to the decision of the King's Bench, in preference to that in our sister state, and by a train of additional reasons and authorities, supports and illustrates the doctrine that it

established. The conclusion of this portion of his argument is stated in these words—"I think I am therefore warranted in saying that the proposition may be considered as established, that the acceptance of a written offer of a contract of sale consummates the bargain, provided the offer is standing at the time of the acceptance."

Applying this principle to the facts of the case, he then determines that by the acceptance of Mactier, in his letter of the 25th of March of the terms that had been offered, the contract between the parties was perfected, and that its validity was not affected or impaired by his subsequent death, previous to the arrival of his letter, although the objection arising from his death would have been fatal, had the knowledge of the respondent, that his offer had been accepted, been necessary to the completion of the contract.

Although this decision has settled the law in New-York, that the force of an acceptance is not suspended until it reach the knowledge of the person who made the offer, but that it binds the contract from the time of its transmission, provided the offer be then open and in force, it neither defines, nor attempts to define, the cases that this proviso embraces : and hence, the question, whether an offer can be revoked by an intermediate act of the party making it, not communicated or known to the party accepting, is left undetermined. It is indeed probable that upon this question, had it arisen, as well as upon that actually decided, the judgment of the Court of Errors would have been governed by the authority of the King's Bench in *Adams v. Lindsell* ; yet it must be confessed, that there are some passages in the opinion of Mr. J. Marcy, that seem to justify an opposite inference. He refers apparently with an entire approbation to the opinions of Pothier and of other writers on the civil law, and seems to adopt their views in all their extent ; but he refers to these opinions, for the sole purpose of showing their correspondence with the actual decision of the court, and his attention was not at all directed to the fact, that the rule which they sanction as to the right of a person, who has made an offer, to revoke it prior to its acceptance, is different from that which the King's Bench had adopted. Hence, his ap-

probation of the specific rule of the civil law is not fairly to be inferred from his general language.

It is stated by Pothier,^(a) (*Traité du Contrat du Vente*, p. 1, § 2, art. 3, no. 32,) that as the consent of both parties at the time of the execution of a contract, is in all cases essential to its validity, an agreement between parties residing in different places can never be concluded, unless the will of the party who has proposed by letter the terms of the agreement, shall continue unchanged to the very moment of the acceptance of the offer by the party receiving it—that in the absence of proof to the contrary, this continuance of his will, will be presumed, but that this presumption may be repelled by evidence of his previous death, or loss of reason, or of an actual revocation, although the facts were at the time unknown to the party accepting. To illustrate these rules he adds—if I have written to a merchant at Leghorn, proposing to purchase from him a certain quantity of goods at a specified price, and before that letter has been received by him, should write him a second, retracting my offer, or before that time should die, or lose my reason, although the merchant

(a) Pour que le consentement intervienne en ce cas, (entre absens) il faut que la volonté de la partie, qui a écrit à l'autre pour lui proposer le marché, ait persévéré jusqu'au temps auquel sa lettre sera parvenue à l'autre partie, et auquel l'autre partie aura déclaré qu'elle acceptait le marché. Cette volonté est présumée d'avoir persévéré tant qu'il ne paraît rien de contraire ; mais, si j'ai écrit à un marchand de Livourne une lettre, par laquelle je lui proposais de me vendre une certaine partie de marchandises, pour un certain prix, et qu'avant que ma lettre ait pu lui parvenir, je lui en aie écrit une seconde, par laquelle je lui marquais que je ne voulais plus cette emplette, ou qu'avant ce temps je sois mort, ou que j'aie perdu l'usage de la raison ; quoique ce marchand de Livourne, au reçu de ma lettre, ignorant, ou mon changement de volonté, ou ma mort, ou ma démence, ait fait réponse qu'il acceptait le marché proposé, néanmoins il ne sera intervenu entre nous aucun contrat de vente : car ma volonté, n'ayant pas persévéré jusqu'au temps auquel ce marchand a reçu ma lettre, et accepté la proposition qu'elle contenait, il ne s'est pas rencontré un consentement ou concours de nos volontés nécessaire pour former le contrat de vente. C'est l'avis de Barthole, et des autres docteurs cités par Bruneman, *ad l. 1. § ff de contra. empt.* qui ont rejeté avec raison l'avis contraire de la Gloze, *ad dictam legem.*"

on receiving my first letter should accept the offer it contained, in ignorance of the change of my will, death or loss of reason, there would be no contract between us: for as my will as expressed in my offer, did not remain unchanged to the very period of its acceptance by my correspondent, there was no such mutual consent, no such concurrence of our wills, as was necessary to complete the contract.

It must be confessed, that the case thus stated by Pothier, while it fully supports the decision of the Supreme Court of Massachusetts, is wholly irreconcilable with that of the King's Bench. The alteration of will in the person who has proposed to sell goods to another, is as certainly manifested by his sale of the goods to a third person, as by an express letter of revocation, and where both acts are equally unknown to the party accepting, no reason can be assigned why they should be differently construed. Such a revocation is of no other use or importance than as evidence of a change of intention: and the same evidence is furnished by the sale.

Pothier, however, adds certain modifications, by which the apparent injustice of the rule that he adopts, is greatly diminished, if not wholly removed. When a person who has accepted an offer, secretly revoked, sustains any injury or loss from his reliance on the execution of the contract, he is entitled to a full indemnity. Thus, when I have offered to purchase goods of a merchant at a certain price, if, after his acceptance of the offer, the goods should decline in value, and he, from his reliance on my offer, has been prevented from obtaining the price I was willing to give, my intermediate revocation will not exempt me from the necessity of making good to him the loss he has sustained, by a payment of the difference in the value of the goods, unless I elect to fulfil the contract according to the terms proposed.(a)

(a) " Observez néanmoins, que si ma lettre a causé quelque dépense à ce marchand pour l'exécution du marché que je lui proposais par cette lettre, ou si elle lui a occasioné quelque perte; *putà*, si dans le temps intermédiaire entre la réception, de la première et celle de la seconde, le prix des marchandises a baissé, et que ma première lettre lui ait fait manquer

Pothier goes still further: Should the merchant in the case supposed, in ignorance of the determination of my will, have actually shipped the goods on my account, he will be entitled to recover from me or my heirs, the full price I had offered to give; for not even my intermediate death will, under these circumstances, dissolve my obligation to indemnify him. Not, the learned jurist adds, that there is any contract of sale from which this obligation arises, but it is implied in the very communication of my offer, and has its sole origin in the rule of natural justice that declares, that no person ought to be prejudiced by the voluntary act of another. *Nemo ex alterius facto prægravari debet.*(a)

Applying these rules to insurance, it will follow, that, should an applicant, in consequence of an intermediate revocation of an offer to insure on certain terms which he had accepted, be compelled to pay a higher premium for the same risks, the underwriters, by virtue of their offer, would be bound to make good to him the difference, and should a loss occur, and intelligence of it be received before he is able to effect another policy, would be bound to indemnify him to the whole extent that the loss would have been covered by a policy corresponding with their offer. Their liability would be the same as if such a policy had, in fact, been executed.

It is evident that the difference between the rule of the civil law as interpreted and qualified by Pothier, and that

l'occasion de les vendre avant la diminution; dans tous les dits cas, je suis tenu de l'indemniser, si mieux je n'aime consentir au marché proposé par ma première." *Pothier ut sup.*

(a) "Par la même raison, si ce marchand de Livourne, au reçu de ma première lettre, avait fait charger pour mon compte, et avait fait partir les marchandises que je lui demandais, avant que d'avoir reçu ma seconde lettre, que contenait la revocation de ce que je lui avais mandé par ma première, ou dans l'ignorance ou il était de ma demence ou de ma mort qui avait empêché la conclusion du marché; quoiqu'en ce cas il ne soit proprement intervenu aucun contrat de vente entre nous, néanmoins il sera en droit de m'obliger, moi ou mes héritiers, à exécuter le marché proposé par ma lettre, non en vertu d'aucun contrat de vente, mais en vertu de l'obligation qu'j'ai contractée par ma lettre de l'indemniser: obligation que résulte de cette règle d'équité, *Nemo ex alterius facto prægravari debet.*" *Pothier ut sup.*

adopted by the King's Bench, is, in a great measure, nominal. If the person who sustains damage by a revocation, of which he was not apprised, of an offer that he had accepted, is entitled to a complete indemnity, whether the damages be given to him as for a breach of an actual contract, or as directly resulting from the act of the person making the offer, is plainly a matter of indifference. The substance of the relief is in both cases the same : the distinction consists solely in the form of the remedy.

The English rule, however, as sanctioned by the case of *Adams v. Lindsell*, that considers the bargain as consummated by an acceptance, and excludes all evidence of an intermediate and secret revocation or disclaimer, is not only recommended by its simplicity, but is in truth the most reasonable. It best corresponds with the real intentions of the parties. It tends most to the preservation of that good faith, which ought to be the living spirit in all commercial transactions, and it removes from contracts of this description an element of uncertainty that by preventing their actual conclusion, would frequently operate to the prejudice of both parties. Thus, should a merchant receive from a distant city, an offer to sell to him a large quantity of goods at a stipulated price, he would hardly consider it at all, unless he could rely on his acceptance of its terms as a conclusion of the bargain. An immediate change in his financial arrangements, may be necessary to enable him to complete the purchase, or his views as to a future advantageous disposition of the goods, may depend for their accomplishment upon measures to be immediately adopted. To require him to suspend all future action, until he certainly knows that there has been no intermediate revocation of the offer, would be, in many cases, to prevent him from acting at all. The rule is also supported by the analogy of the law. In good sense there is no distinction between an offer communicated by letter, and a similar offer made by a special agent. The principal can never defeat the contract of his agent by evidence of a secret revocation of the authority he had given. The revocation to be valid, must have reached the agent before the offer made by him, according to his instructions,

had been accepted.(a) Now an offer communicated by letter, in the fair construction of the intent of the party, is an authority to the person receiving it, to conclude the bargain by an acceptance of its terms, and no just reason can be given why the authority should in this case be more liable to a secret revocation than in the other.

I am also satisfied, from the inquiries I have made, that the English rule is in perfect harmony with the general understanding and usage of merchants, and upon such a subject the practice of merchants is an unerring index to their interests and convenience. The usage can only spring from a conviction of its utility, and it is only by the *experience* of its utility that it can be established.

It is assumed in the decisions in Massachusetts, that an acceptance by letter may be withdrawn or revoked, provided the revocation reach the party to whom the bargain was proposed before the acceptance; but if the contract is perfected from the time that the acceptance passes from the hands of the party to be transmitted, it is a necessary consequence that from that time, the contract, without the consent of both parties, cannot be rescinded. That this is the true rule, Chancellor Walworth, in the case of *Brisban v. Boyd*, distinctly admits, (4 *Paige*, 20.)

There are other questions connected with the subject, which, as they have little practical bearing on insurance, I omit to discuss. Upon these questions, scarcely any light has been shed by the cases hitherto adjudged, and when they arise, it is chiefly by a reference to principle and analogy that they must be decided; yet if I mistake not, they all admit of a satisfactory and equitable solution by considering the offer in all cases as a *revocable* authority, and applying to the relation and acts of the parties, the rules that flow from that consideration. By denying that the offer carries with it an authority to the person receiving it, you subject it to an unlimited and absolute power of revocation, while, on the

(a) This is also the rule of the Roman law. Si mandassem tibi ut fundum emères, postea scripseissem ne emeres, tu antequam scias me vetuisse emissas mandati tibi obligatusero. *Dig. lib. 17, tit. 1, sec. 15.* Vide *Story on Agency.* (2d ed. p. 600, 601.)

other hand, by considering the authority given as *irrevocable*, you convert the offer into a *contract*, and encounter the legal anomalies of an agreement without a consideration, and binding on the one party and not on the other. These opposite difficulties are avoided and a rule provided of universal application, by considering the offer as an authority revocable in itself; but not to be revoked without notice to the party receiving it, and never after it has been executed by an acceptance. The whole subject merits in an eminent degree the attention of jurists, and demands a much more thorough investigation than it has yet received.

NOTE X.

P. 70, § 15. In the case of *Mead v. Davison*, (3 *Adol. & Ellis*, 303,) before cited, (*Sup. Note 7*,) although the counsel for the plaintiff distinctly admitted, that when there is an unstamped agreement to insure, the parties have no security but in the honor of each other for the performance of their respective engagements, yet Lord Denman, in delivering the judgment of the court, held "that the defendant, in executing the policy voluntarily, had only performed a manifest duty, since a court of equity would have compelled him by virtue of his previous agreement, to execute a policy whenever it was tendered to him:" and this position seems to have been the main ground of the decision. As the statute (35 *G. 3. c. 37*,) before quoted, declares that every agreement not engrossed, printed or written, and duly stamped, is null and void, to all intents and purposes," the court must have regarded the payment of the premium, which Lord Denman says, "was the price actually given and received for the underwriter's indemnity for the contingency that had occurred," as a part performance, that by analogy to the decisions on the statute of frauds, exempted the case from the provisions of the statute.

It does not appear that in France there is any legal agreement between the parties independent of the policy. It is stated by Emerigon, that it was formerly the custom of the

underwriters to subscribe their names to a policy wholly in blank, trusting to the good faith of the broker, to fill it up according to the terms of their verbal agreement, and that this irregular and dangerous practice, although violating an express provision in the ordinance of the Marine, and forbidden under severe penalties by subsequent laws, not only subsisted when he wrote, but seemed likely to be perpetual,—“*elle subsiste et peut-être subsistera toujours.*” It seems probable, however, from the silence of the modern writers, Boulay Du Paty, Alauzet, &c., that the abuse no longer exists. It is also stated by Emerigon, that the broker, when blank policies were signed, usually delivered to each underwriter a memorandum in writing of the risks assumed and of the premium to be paid; and that disputes frequently arose between the underwriters and the broker, from an alleged variance in the terms of the policy from those of the memorandum. The underwriters, however, in these cases, were without remedy—they could not use the memorandum to correct the policy, since the latter, by the law of France, is the sole evidence of the agreement of the parties. The underwriters are not allowed to contradict their own act, and if deceived and cheated, (Emerigon coolly adds,) they have themselves only to blame—“*Sils sont trompés qu'ils l'imputent à eux-mêmes—sibi imputent.*” (1 *Emer. ch. 2. sec. 4. p. 47, 8.*) They ought not to have violated the law by signing a blank policy. The abuse that he so strongly condemns, it is admitted by Emerigon, had its origin in the frequent necessity in which merchants are placed, of concluding an insurance before a policy in form can be executed. The usage, in the United States, of a prior agreement, has the same origin, and it fortunately happens that our law gives its sanction to a practice, that merchants, from a just regard to their own interests and convenience, have been led to adopt.

NOTE XI.

P. 71, § 16. The reformation of a policy so as to correspond with the previous agreement of the parties, is only

a particular application of the general power of a court of equity to rectify a mistake in written instruments, and the exercise of this power depends in all cases upon the same principles. It is the uniform language of the cases that, where the mistake is denied by the party, against whom it is alleged, the proof of its existence must be such as to remove all possible doubt from the mind of the court. Lord Thurlow says, (1 *B. C. C.* 341,) that it must be "irrefragable;" Chancellor Kent, that it must be "demonstrative," (2 *Johns. Ch. Rep.* 633;) but the expressions of Lord Hardwicke, (1 *Ves.* 319,) that it must be the "strongest possible," seem rather meant to apply to the circumstances of the particular case in which they were used, than to be intended as a general rule. It is owing to this strictness and difficulty of the proof that so few cases are to be found in the reports in which the relief sought has been actually given, although Lord Thurlow seems to have been mistaken in saying in *Truman v. Child*, (1 *B. C. C.* 94,) that there was no previous instance where the evidence had prevailed against a party insisting that there was no mistake. The opinion of Chancellor Kent, in the case of *Gillespie v. Moon*, (2 *Johns. Ch. Rep.* 593,) contains a full review of the English decisions, and a most lucid and satisfactory explanation of the reasons on which they are founded. In conformity to my general plan, I shall confine myself to the cases that have a special relation to insurance.

The earliest reported case is that of *Motteux v. The London Assurance Company*, (1 *Atk.* 545,) before Lord Hardwicke, in 1739. The policy was expressed to be on the ship *Eyles*, from Fort St. George, in the East Indies, to London, but previous to the execution of the policy, a label of the agreement was entered in a book of the company, and signed by an agent of the plaintiff and two of the directors of the company, and in this the risk was described to be "at and from Fort St. George;" under the circumstances of the case, the loss claimed, would not have been recoverable, unless the words of the policy were made to agree with those of the label. Lord Hardwicke said, that the label made the intentions of the parties very clear, and that

the variance in the policy was plainly a clerical mistake which ought to be rectified.

In the case of *Henkle v. Royal Exch. Ass. Co.*, (1 *Ves. sen.* 317,) which was also a bill to rectify a mistake in a policy, Lord Hardwicke again asserts, in strong terms, the jurisdiction of the court, to relieve "in respect to a plain mistake in contracts in writing, as well as against frauds in contracts," but he denied the relief sought, upon the ground that there was no sufficient evidence to vary the contract from the written words of the policy.

In the case of *Lyman v. The Uni. Ins. Co.*, (2 *Johns. Ch. Rep.* 630,) the plaintiff sought to have the policy amended, by striking out a clause, describing the vessel as American, and inserting a provision that she might sail with a Portuguese passport. There was no previous agreement signed by the parties, but the plaintiff relied on his written application, in which it was mentioned that the vessel was to have a royal Portuguese passport, as sufficient evidence of the understanding of the parties. The defendants, in their answer, averred that the policy truly expressed the terms of the agreement as they understood them—that they believed the vessel to be American, and to be documented as such, and in that character alone meant to insure her, and that they would not have insured her to sail with Portuguese papers, except at an additional premium, which the plaintiffs had refused to give.

Chancellor Kent, in delivering his opinion, said, "The difficulty in this case arises from the want of the requisite evidence, of any agreement of the parties different from that expressed in the policy. The cases, which treat of this head of equity jurisdiction, require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court." The Chancellor then proceeds to show by a critical examination, that neither from the testimony of the witnesses, nor the memorandum of the written application—a memorandum imperfect in itself and not proved to have been assented to by the company—was it possible to deduce any clear evidence of a contract, different from that contained in the policy, and he concludes with these forcible remarks: "To alter a clear written contract

of the parties, without any parol proof to warrant the new agreement, and when the charge of mistake is denied in the answer, and denied by a witness present, and to do this upon no other evidence than an imperfect memorandum '*obscuris vera involvens*,' would be destructive to the certainty and safety of written contracts. There is no case that goes such lengths; no amendment was ever made, without absolute conviction of the truth and precision of the real agreement. There is no, or at least not sufficient, evidence, that the defendants ever did agree to any other terms of insurance, than those expressed in the policy. The bill must, consequently, be dismissed." The dismissal was, however, without costs, on the ground of a possible misapprehension between the parties.

In the case of *Graves & Barnwell v. The Boston Mar. Ins. Co.*, (2 Cranch, 419,) the object of the bill was to reform the policy, so as to make it cover the joint interest of the plaintiffs as partners, instead of the undivided interest of Graves: but the relief was denied upon the ground, that although the intentions of Graves, were probably such as stated in the bill, there was no sufficient evidence that they were so understood by the company. Chief Justice Marshall, who delivered the opinion of the court, laid much stress upon the circumstances that no mistake was alleged until after the happening of the loss, when the policy had been for several months in the possession of the agent of the plaintiffs, by whom it was effected, and who ought to have known its terms, before it was executed. It is however worthy of remark, that in the case of *Motteux v. The London Assur. Co.*, before cited, where the facts were entirely similar, the policy having been effected and retained by an agent, and no mistake alleged until after the loss, Lord Hardwicke seems to have regarded the circumstances as wholly unimportant. The opinion of the chief justice, however, seems the most agreeable to principle and analogy. It is as much the duty of an agent who effects an insurance, to examine the policy, as that of his principal, and the cases are numerous in which the neglect of an agent in the discharge of a known duty, is regarded as that of his principal. The true rule seems to be that a delay in the examination of the policy, whether by

the principal or the agent, is, in all cases, a fact to be taken into consideration, but in none is it conclusive. The presumption of acquiescence, that arises from it, may be repelled by other circumstances.

It is evident, that the exercise of the equitable power of reforming the contract may greatly depend upon the fact, whether the policy is to be considered the act of the party seeking relief, or that of the defendant. Where the insurance is made by private underwriters, the policy is usually filled up by the broker of the assured. Should a bill for the reformation of such a policy be filed by the assured, it would be exceedingly difficult for a court to relieve him against the errors or omissions of his own agent, although it would be presumptuous to say that cases may not arise in which the relief might properly be granted.^(a) There is a wide difference where the insurance is made by a company. By the uniform practice, the policy is then made out by the officers of the company who are bound to know and follow the terms of the previous agreement. Hence, in these cases, where the evidence of the agreement is clear and positive, and there are no grounds for inferring a subsequent acquiescence in the contract, as expressed in the policy, the reform of the policy, so far as it varies from the agreement, is a matter of course.

In the following case, the last to be cited—a deserved stress, although for opposite purposes, is laid upon the fact, that the policy was the act of the company. *Hogan v. Del. Ins. Co.*, (1 Wash. C. C. R. 419.) *Del. Ins. Co. v. Hogan* (2 Wash. C. C. R. 4.) These cases relate to the same policy, and are the same in the material facts. The first being an action at law, by the assured, for the recovery of a loss under the policy, and the second, a bill for the reform of the policy filed by the company. On the trial of the suit at law, it was agreed by the counsel, that the court should have

(a) In the case of *Bull v. Stone*, (1 Simon & Stuart, 210,) it was held by the Vice-Chancellor, that a mistake may be rectified even in an instrument drawn by the party seeking relief: but in this case the mistake was admitted by the answer.

the same power and give the same relief to the defendants, as if sitting in equity upon a bill to amend the policy. The policy contained a written clause, that the premium was at the rate of $7\frac{1}{2}$ per cent.—“to return $6\frac{1}{2}$ on so much as may be insured in England previous to this insurance.” The order for insurance was founded on certain letters of the plaintiff, which were exhibited to the company, and which stated, that he had ordered insurance in London, and that he wished the insurance his correspondent might effect to be cancelled in the event of its being made in London. To this order, the president of the company made in writing the following addition, “Insurance being ordered on this property, or part of it in England, it is understood that in case such insurance is made, it shall supersede the present for so much as shall be effected, and one per cent. only of the premium retained.” A policy upon the premises insured, was effected in London eight days after the policy of the defendants.

It was insisted by the counsel for the company, that the words of the order, with the addition made by the president, were to control and supersede those of the policy, as evidence of the real agreement; and that the true construction was, that the policy was to be cancelled in the event of any insurance, without reference to time, being made in England, and consequently as a full insurance had been effected in London, that the defendants were exonerated. Mr. J. Washington was, however, of opinion, that the words of the order were far too ambiguous to control the plain and express words of the policy, which, under the circumstances, and especially after the happening of a loss, he considered the only safe evidence of the intentions of the parties. Upon the bill subsequently filed by the company, the same facts appeared in evidence, with the addition, that the policy from the time of its execution until the happening of the loss remained in the possession of the president of the company. Mr. J. Washington adhered with much strength of reasoning and language to his former opinion, and, after stating that it was entirely doubtful, whether the intentions of either party were different from those expressed in the policy, closed his decision in these words—“If further ob-

servations be necessary to render this case clear, let it be noticed, that the addition to the order, and the insertion of the clause in the policy, now objected to, were made by the party (the president of the company) now asking relief, and that the policy remained with him, without a suggestion being made, that it was repugnant to the real agreement of the parties until after the catastrophe had occurred, upon which his obligation to indemnify the other party had become complete—all the principles of law and equity are against him."

The last and most important case, as containing in the opinion of Mr. J. Story, a more clear and full enumeration of the principles upon which relief is administered than any other, with the single exception of *Gillespie v. Moon*, is that of *Andrews v. Essex F. and M. Ins. Co.*, (3 *Mason*, 6.) This was a libel in admiralty founded on a policy of insurance, charging, that a material clause in the previous agreement of the parties had been omitted by mistake, and declaring upon the policy as reformed. The omitted clause in the written application that had been assented to by the company, was in these words—"The Union (the vessel named) is bound to Kingston, Jamaica, if not allowed to trade there, will proceed to Cuba"—and it was insisted by the plaintiffs, that, had this clause been inserted, the underwriters would have been clearly liable for the loss that had resulted from the seizure and condemnation, at Jamaica, of the property insured for an illegal trading. The opinion of Mr. J. Story, upon the various questions arising in the case, is distinguished by its lucid reasoning, and its accuracy of research: but I shall extract only the preliminary remarks that have a direct relation to the present subject.

"There cannot at the present day," (he observed,) "be any serious doubt, that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake. And a policy of insurance is just as much within the reach of the principle, as any other written contract. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to

vary a written instrument. It ought, therefore, in all cases to withhold its aid, where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger when the instrument is to be reformed by reference to a preliminary written contract, which it was designed to execute. But even here, there is abundant room for caution, since the parties may have varied their intentions, or the clause may not have been originally understood by either party, to go to the extent now required. And these considerations acquire additional force, where circumstances have occurred in the intermediate time, which give an intense importance to the asserted mistake. Under these limitations the doctrine of courts of equity on this subject, does not seem at variance with general convenience or justice.

"In the present case, the memorandum signed by the plaintiff after it was agreed to by the president of the company, constituted a good and valid agreement binding upon the parties. The by-laws of the company make it in such a case, expressly obligatory upon them; and if there be an omission in the policy of any clause constituting a part of that agreement, it ought in equity and good conscience to be corrected. It is not sufficient for the underwriters, that they suppose the words do not cover a particular risk, for they may mistake the law, and their mistake shall not prejudice the other party. When once the contract is agreed to, whatever that contract, by a just and reasonable interpretation includes, the underwriters are bound to insert in the policy, and if they omit to do it, the assured has a right to insist upon a perfect conformity to the original proposition and agreement."

The learned judge then proceeded to show, that a court of admiralty has no power to reform a policy, its jurisdiction over maritime contracts being confined to such as are complete in their form and attestation. 2. That the omitted clause being only intended as the representation of a fact, ought not to have been inserted in the policy: and, lastly, that its insertion in the policy would not have varied the rights of the parties, by making the company responsible for the actual loss: and upon these grounds he dismissed the libel.

NOTE XII.

P. 74, § 18. The illustration, as well as the doctrine in the text, is taken from the case of *Hogan v. The Del. Ins. Co.*, (1 *Wash. C. C. R.* 419,) cited in the preceding note. In the course of his opinion, Mr. J. Washington made the following observations: "We are next to consider whether the order for insurance can be resorted to for the purpose of giving a construction to the policy. Now, I take the rule to be that, if by mistake, a deed be drawn plainly different from the agreement of the parties, a court of equity will grant relief by considering the deed as if it had conformed to the agreement. If the deed be ambiguously expressed, so that it is difficult to give it a construction, the agreement may be referred to in order to explain such ambiguity. But if the deed be so expressed that a reasonable construction may be given to it, and when so given, it does not plainly appear to be at variance with the agreement of the parties, the latter is not to be regarded in the construction of the former."

The power of a court of equity to rescind an agreement arising from a mistake as to material facts, is well established, and no mistake can be more material than the misapprehension by the party drawing the agreement of the intentions of the other. (1 *Story's Equity Juris.* 178, and *cases ib. cit.*) In truth, the jurisdiction of the court rests upon the same ground as its power to reform a contract varying from a prior agreement. In both cases, the instrument as drawn does not express the mind of the parties, but the essential requisite of a valid contract, mutual consent, is in both equally wanting. In *Shelburne v. Inchiquin*, (1 *Brown C. C.* 350,) Lord Thurlow says—"If two persons entrust a third person to draw up minutes of their intention, and that person does not draw them according to such intention, that case might be relieved." Whether the mistake be committed by a clerk employed by both parties, or by one party to the prejudice of the other, can make no difference in the application of the principle.

NOTE XIII.

P. 75, § 20. In *De Hahn v. Hartly*, the words "sailed from Liverpool, with 14 six pounders, &c.," written in the margin of the policy, were held to be a part of the policy and to operate as a warranty. (1 *Term*, 343.) So in *Kenyon v. Berthon*,⁴ (*Doug.* 12, no. 4,) the words, "In port on the 20th July," written transversely in the margin, were held by Lord Mansfield to be a warranty. See also *Bean v. Stupart*, (*Doug.* 11.) *Guerlain v. Col. Ins. Co.*, (7 *Johns.* 527,) where the goods insured were particularly described in the margin. *Ewer v. Wash. Ins. Co.*, (16 *Pick.* 502.) *Harris v. Eagle Ins. Co.*, (5 *Johns.* 368,) and *Duncan v. The Sun Fire Ins. Co.*, (6 *Wend.* 498.)

NOTE XIV.

P. 76, § 20. The Ordonnance de la Marine, (*Tit.* VI. *Art.* 68,) prohibits all "*Greffiers de Police, &c. &c., de faire signer des Polices, on il y ait aucun blanc*," and I had inferred from the language of Valin, (2 *Val.* 153,) and of Emerigon, (2 *Emer.* 47,) that the breach of this provision drew after it, as a necessary consequence, the invalidity of the contract. The Code de Commerce, (*Art.* 332,) also declares that the policy shall contain no blank—" *Il ne peut contenir aucun blanc*," but we are assured by Boulay Du Paty, (3 *Boul. Du Paty*, 266,) who fortifies his own opinion, by a reference to those of Locré and Pardessus, that the mere existence of a blank never avoids the policy, unless it affects the essence of the contract, by leaving the sense imperfect, or where a new provision has been inserted by fraud. Upon this construction, the prohibition of the Code is without a sanction, and in effect a nullity. Were there no such prohibition, an uncertainty arising from the omission of necessary words, or a fraudulent alteration of the policy, would equally vitiate the contract.

NOTE XV.

P. 79, § 24. Mr. Phillips refers to the three cases of *Sanderson v. Symonds*, (1 *Brod. & Bing.* 426. 4 *Moore*, 42.) *Sanderson v. McCullom*, (4 *J. B. Moore*, 5,) and *Forshaw v. Chabert*, (3 *Brod. & Bing.* 158 ; 6 *Moore*, 369,) but he seems to have mistaken the grounds of the decision in the two first of these cases, and in the last has certainly mistaken, and therefore misstated the decision itself. *Sanderson v. Symonds*, and the *Same v. McCullom*, arose on the same policy, and in each case the immateriality of the alteration was the sole ground of the decision, that the underwriters who had not assented, remained liable on the original contract. In *Forshaw v. Chabert*, the alteration was material, and it was held by the court, that by a necessary consequence, the defendant, who had not assented, was discharged. In other words, that as to him, the effect of the alteration was to annul the original contract. Mr. Phillips was probably misled by the generality of the language of Richardson, J., in *Sanderson v. McCullom*, and hence assumed, that the subsequent decision of the same court in *Forshaw v. Chabert*, corresponded with the rule, which that learned judge then seemed to recognize and establish. Mr. J. Richardson says, "The original policy expresses on the face of it a contract with several individuals as underwriters ; if therefore, some of them consent to the alteration after it is executed by them, and others refuse to do so, those who consent make the altered instrument their own, and those who do not, remain liable on their original contract"—language that certainly seems to imply that as, when there are several underwriters, there is a several contract with each, an alteration however material in the contract of one, cannot affect the contract of another not adopting the alteration : which if the several contracts were in separate policies, instead of being contained in one instrument and embraced in the same form, would be perfectly true. The learned judge, however, could only have meant his observations to apply to cases where the alteration is immaterial, for in giving his opinion in *Forshaw v. Chabert*, that the alteration avoided the policy, he distinguished the case from *Sanderson v. Sy-*

monds, (which is identical in its circumstances with *Sanderson v. McCullom*,) by saying that the alteration there was entirely immaterial.

NOTE XVI.

P. 81, § 25. I shall give a condensed view in this note of the English and American decisions, on the subject of alterations in the policy.

Langhorn v. Cologan, (4 *Taunt.* 330.) In the policy as signed by the defendant, the insurance was declared to be on goods and merchandise generally, and on the vessel; the plaintiff afterwards inserted in a blank of the policy, the written words, "100 hogsheads of fine sugar, 60 hogsheads of molasses, and 20 tons of fustick," so as to make the insurance attach specifically on those articles; some of the underwriters expressed their assent to the alteration, by signing their initials; but the consent of the defendant was not proved to have been given, and as there was no allegation of fraud, it was insisted that he remained liable on the original contract. The court, however, refusing to set aside a nonsuit, determined that as the alteration was material, it avoided the policy, and that there could be no return of premium. C. J. Mansfield, in delivering his opinion, said—"The alteration is a very material one. When once a declaration of interest is made, the policy attaches, not on any goods the plaintiff might put on board, but on those comprehended in that declaration. The instrument, therefore, as to those who do not assent to that declaration, is gone. As to a return of premium, suppose the assured tears the seal off his policy, can he, by his own act, compel the assurer to return the premium? The underwriter has fulfilled all his part: the assured can no more compel the underwriter to return the premium, than the underwriter can compel him to relinquish the contract."

Fairlie v. Christie, (7 *Taunt.* 416.) The policy contained a warranty that certain vessels to which the insurance related should sail on or before the 10th of October,

but the plaintiff had struck a pen through the date, in the body of the policy, 10th of October, and had inserted in the margin, opposite the warranty, the words—"on or before the 31st of December," to this alteration, some of the underwriters, but not the defendant, had assented by signing their initials. One of the vessels on which a loss was claimed, had sailed before the 10th of October, and it was insisted that for his proportion of this loss the defendant was liable under the original terms of the policy, upon the ground, that the date in the body of the policy had not been obliterated by an actual erasion, and therefore was unaffected by the alteration in the margin. The court were, however, unanimously of opinion, that the alteration was so material, that it destroyed the policy as to all the underwriters who had not assented to it, and C. J. Gibbs remarked, that "he did not know that the plaintiff did not mean to avoid the policy as to all the underwriters. He might have been confident that he would obtain the consent of all, and might have intended if any did not agree, to effect a new policy to the extent of the interest left uncovered." These observations seem applicable to every case where the alteration is made without a fraudulent intent.

Campbell v. Christie, (2 Starkie, 57.) By the original words of the policy as executed, the insurance was from Calmor to Portsmouth. The plaintiff afterwards, in the presence and with the assent of some of the underwriters, inserted into the body of the policy the words, "or Weymouth," after the word Portsmouth. The defendant was ignorant of the alteration, and Lord Ellenborough, upon the ground that an alteration, without the consent of all the underwriters, avoided the policy, nonsuited the plaintiff. *Sanderson v. Symonds*, (1 Brod. & Bing. 426,) and *Sanderson v. McCullom*, (4 Moore, 5,) are sufficiently stated in the text and in the preceding note.

Forshaw v. Chabert, (3 Brod. & Bing. 158.) The vessel was insured from Cuba to Liverpool, and after the policy had been subscribed by all the underwriters, the plaintiff inserted in the body of the policy, after the word "Liverpool," the words—"with leave to call off Jamaica." All the underwriters, except the defendant, sanctioned the alte-

ration by signing their initials, and one of the questions in the case was, whether the alteration, which in the event had proved to be immaterial, had avoided the policy as to the defendant. On this question, Dallas, C. J., observed: "The words introduced must be taken to increase the risk, and are introduced into the body of the policy, making it in effect a different instrument from what it was when subscribed by the defendant. I need not go into the general doctrine touching the alteration of deeds; it is clear that an alteration in a material fact will render an instrument void. In the present case, the alteration, when made, was material, and only became immaterial with respect to subsequent events. But it is material to consider the effect of the alteration when made; if it increased the risk, then it was material, and not warranted by any authority. The only case I shall advert to, is *Sanderson v. Symonds*; in that case the alteration was no alteration of the contract. The broker having inserted the words—"and trade," after the words "during her stay," the court held, there was no material alteration, because the instrument, as originally drawn, gave the plaintiff leave to trade. In the present case, the alteration was material at the time it was made, and what arose afterwards cannot have a retrospective effect." The learned judge then gave his decision against the plaintiff on two grounds. First, That the ship was not seaworthy at the time of sailing; and secondly, That there had been a material alteration in the policy. Park, J., and Burrow, J., concurred with the Chief Justice on both grounds, and Richardson, J., on the second.

In *Head v. Providence Ins. Co.*, (2 *Cranch*, 168,) it was held by the Supreme Court of the United States, that an agreement to cancel a policy was not binding on the insurance company, not having been signed by the president and secretary of the company, who, by the terms of the constitution and by-laws, were required to sign the policy itself.

In *Merry v. Prince*, (2 *Mass.* 176,) it was determined, that an agreement on the back of the policy, by which one underwriter was substituted for another, was binding on the substituted underwriter and the assured, although signed

only by the insurance broker ; but Sedgwick, J., dissented, and the propriety of the decision seems very questionable.

NOTE XVII.

P. 14, § 29. *Kensington v. Inglis*, (8 East, 279.) The insurance was on goods at and from Havana and Matanzas to Nassau, New Providence, on board of—"ship or ships sailing between the 1st of October, 1799, and 1st of June, 1800, inclusive." By a memorandum written on the policy, dated the 11th of June, 1800, it was agreed to extend the time of sailing to 1st of August, 1800. It was insisted for the defendant, that, as this memorandum was without a stamp, the agreement, as an alteration of the policy, was void upon two grounds. 1st, Because when it was made, the original risk was known to the parties to be determined ; and 2dly, Because it was an alteration of the very subject of insurance, the time of sailing being an essential part of the description, by which the subject was identified. In reply to the first objection Lord Ellenborough said,—“The unstamped memorandum of the 11th of June, 1800, was said not to fall within the proviso contained in the 13th section of the stat. 35 G. 3, c. 63. And this objection was shaped two ways : 1st, That the memorandum was in reality made after notice of the determination of the risk originally insured : and 2dly, That it introduces a new subject of insurance, or thing not before insured. It was agreed, that it was after notice of the determination of the risk originally insured ; because, by the terms of the policy, the risk insured was goods shipped on board *ships which should sail before the first of June* ; and this memorandum was not added until the 11th of June, at which time it was notorious that the 1st of June was past, and that, therefore, the risk had determined. But this part of the objection is founded on a misapplication of the term, ‘*determination of the risk insured*,’ which means that determination of it which is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage ; and this memorandum is stated by the bill of exceptions to have been written on the policy (as, in

fact it must have been) before the loss happened. The second way of shaping this objection to the memorandum was, that it introduces a new subject of insurance, or thing not before insured ; viz., goods on board ships sailing *after* the 1st of June ; the object of insurance being pointed out, or marked, only by the time of the sailing of the ships on board which the goods should be." His lordship then proceeded to show by an elaborate argument, that this objection was equally unfounded, and that although the effect of the agreement was to extend the time of sailing, the object of the insurance was unchanged. The property insured being the identical property meant to be covered by the original policy, and the day of sailing, although included in the description, not being necessary to identify the property.

Ramstrom v. Bell, (5 M. & S. 267.) The voyage described in the policy, was from Stockholm to Swinemunde. The vessel having in the prosecution of this voyage been injured in a storm, put into Wisbuy to repair, and while there, undergoing repairs, the plaintiff applied to the underwriters to change her destination, and with their consent duly given, the words—"Konigsburg or Memel," were inserted in the body of the policy after the word—"Swinemunde." It was insisted for the defendant, that as the plaintiff had resolved to change the port of destination before he applied to the underwriters, there was "a determination of the risk originally insured, and hence, that the alteration being without a stamp was void." But the court overruled the objection, and gave judgment for the plaintiff. Lord Ellenborough expressed his opinion as follows : "It seems to me, that the argument for the defendant, has confounded a contemplation to determine a voyage with the actual determination of it. The assured had a purpose of change arising *ex justa causa*, and whilst it was in contemplation, the proposal was made to the underwriter and assented to by him—that Konigsburg should be the ship's destination. If the underwriter had not assented, the assured might have thrown the risk upon him by going to Swinemunde, instead of which, the application is made for the underwriter's benefit. The act says, 'so that the alteration be made before notice of the determina-

tion of the risk.' The alteration was made, while there was only an intention to determine the risk."

Brocklebank v. Sugrue, (1 *Ba. & Ad.* 81.) A policy duly stamped was effected on a ship, on a voyage at and from Liverpool to Quebec. The ship being detained at her port of departure beyond the usual time, a memorandum was endorsed upon the policy, changing the voyage by substituting St. John's, New Brunswick, for Quebec, and, in consideration of an additional premium, continuing the risk, until the arrival of the vessel in London, or other discharge port, in the United Kingdom upon her return voyage. This memorandum was not stamped, and upon that ground the judge at *nisi prius*, held that it could not be received in evidence. Upon the argument of a rule for a new trial, it was insisted by the counsel for the defendants, that the change of voyage being made before that described in the policy had commenced, was in effect, the substitution of a new contract, and that as by the act 55 *G.* 3, c. 184, a lower rate of duty is imposed on policies, where the voyage is from one port in the United Kingdom to another, than that upon voyages to foreign ports, to permit in all cases a change in the port of destination, would lead to frauds upon the revenue: and contended upon both grounds, that a new stamp was indispensable. The court, however, granted a new trial, and Lord Tenterden, in delivering their opinion, said: "We are of opinion, that the memorandum endorsed on this policy ought to have been received in evidence, and that the policy, in which the memorandum must be considered as incorporated, is not void for want of a new stamp. The 35 *Geo.* 3, c. 63, s. 13, ought to receive a liberal construction, and so construing it, we think the substitution of New Brunswick for Quebec, was an alteration in the terms and conditions of the policy within the meaning of these words in that section. It seems to us, that the statutes 54 *Geo.* 3, c. 133 and c. 144, have not any effect upon the other acts. It is said, however, that by the last stamp act, a different rate of duty is imposed upon policies, when the voyage insured is from one port of the United Kingdom to another, and when it is from a port in the United Kingdom to any foreign port, and that, there-

fore, if a party is at liberty to substitute one port or destination for another, he may, when the original policy is on a voyage from one port in the United Kingdom to another, substitute a port out of the country, and the revenue may be prejudiced. But the 13th section of the 35 *Geo. 3*, c. 63, must be considered as incorporated in the 55 *Geo. 3*, c. 184, and then it is quite clear, that the terms of the original policy cannot be so altered, by any memorandum, as to bring it into a class requiring a higher duty under the last act, without affixing the stamp thereby required."

Weir v. Aberdeen, (2 *B. & Ald.* 320.) This case is sufficiently stated in the text. Its important bearing on the implied warranty of seaworthiness, will hereafter be explained.

Hill v. Patten, (8 *East*, 373.) The original insurance was on ship and outfits, and long after the ship had sailed, by a memorandum endorsed on the policy, it was agreed that the interest on the policy would be on "ship and goods," instead of "ship and outfits," as originally declared; the memorandum was unstamped, and upon that ground the underwriters refused to pay the loss. Lord Ellenborough, in delivering the opinion of the court, after remarking that the question was whether the alteration made, required a new stamp within the meaning of the statute, and showing that the term "outfits" was in no sense, applicable to goods, and hence that the subject insured was undoubtedly changed, stated "that the case turned on that provision of the statute, which requires 'that the thing insured should remain the property of the same person or persons,' and said the words, 'the thing insured shall *remain* the property,' &c., appear to us properly to require and apply to *one* identical and continued subject matter of insurance, such subject matter *all along remaining* the property of the same proprietor; and to be ill suited to a case like the present, where the thing last insured is not only in fact, but in name and kind, (as a specific subject of insurance,) effectually different from the thing first insured, and which begins also to have an existence at a different and much later period than the other; and when the thing, first insured, hardly or in a small degree *remains* or continues to

exist at all. To make the words of the provision tally with such a case, instead of '*the thing insured*,' it should be read in the plural number, '*the things insured*,' and instead of '*shall remain*,' it should be read, '*shall be the property, &c.*' With all the unwillingness which we cannot but feel to give way to an objection which the underwriters bring forward in despite of their own consent on this subject once given, we are, nevertheless, obliged to give effect to it, by pronouncing that the terms of the act have not been complied with ; and that the policy, in its last and altered state, is to be considered, on account of such alteration, as an unstamped policy ; and the contract which it purports to contain, as being on that account void." In the course of his opinion, Lord Ellenborough seemed to lay much stress upon the fact that the alteration from "ship and outfits," "to ship and goods," was made after the ship had sailed on the voyage insured, and "of course after the policy had fully attached upon what was at the time the thing or subject insured," language from which it may be inferred that an alteration made before the inception of the risks, and while the contract is yet inchoate, would not be considered as requiring a stamp within the statute. The contract not being in full force, the alteration would not be considered as that of a subsisting policy.

Hubbard v. Jackson, (4 Taunt. 169.) The insurance was upon hemp, marked R, by "ship or ships, warranted to sail on or before the 20th of August." By a memorandum subsequently endorsed upon the policy, it was agreed to cancel the warranty of the time of sailing, and to withdraw the mark upon the hemp, and as the memorandum was without a stamp, it was contended that these alterations were void, and avoided the policy. Upon a motion to set aside a verdict for the plaintiff, the objection as to the warranty seems to have been abandoned, and the argument was confined to the alteration effected by withdrawing the mark upon the hemp. Mansfield, C. J., in delivering the opinion of the court, said "the question is whether the alteration of the letter R on the hemp, is an alteration of the thing insured. If it is so, the policy is void for want of a new stamp ; but if it is not an alteration of the thing insured,

it is an alteration in the terms of the policy, warranted by the section, and no new stamp is required. One does not well understand the meaning of these marks. In a general ship, the mark is important to distinguish the property of A. from that of B., but here no cause appears for such marks. It does not appear that the letter R denotes any particular species or quality of hemp, and except for the circumstance of not having the mark alleged in the first policy, the plaintiff could have recovered on that policy without any alteration. We, therefore, are of opinion that this alteration is an alteration warranted by the 13th section of the act. At first it struck me that this was not within the meaning of the words "terms or conditions," this being rather a part of the description of the subject matter, than a term or condition of the contract; but we think, upon the whole, that no new stamp was necessary."

Sawtell v. Loudon, (5 *Taunt.*, 359.) The policy, by a mistake of the broker, was effected on the ship; but by a subsequent memorandum in the margin, signed by the underwriters, it was altered to an insurance on "goods," according to the original intentions of the assured. It was contended, that the alteration required a new stamp; but Heath, J., in delivering the judgment of the court, said:—"We are of opinion that no new stamp was required. The intention of the parties ought to be considered. They never meant to enter into the first contract. Therefore it was, in truth, no contract at all: consequently, the alteration is not such an alteration of the subject matter as requires a new stamp."

In *Robinson v. Touray*, (1 *M. & S.* 217,) the insurance was first declared to be on the *Neptunus*, but this being a mistake, was corrected by inserting the true name of the ship, "*The America*." A motion was made to set aside the verdict for the plaintiff, partly on the ground, that the alteration required a stamp; but the court considered the objection so plainly groundless, that they refused a rule on that point.

Robinson v. Tobin, (1 *Starkie*, 268.) The declaration averred the policy to be on the plaintiff's share of goods, say 1-5th, valued at £1000. The insurance was originally

effected, "on the profits of goods, valued at £500;" but the plaintiff, some days after the defendant had subscribed the policy, discovering his interest to be different from that stated, caused the words describing his interest, as averred in the declaration, to be inserted in the margin of the policy, and the defendant assented to the alteration by signing his initials. It was objected for the defendant, that the plaintiff ought to have averred the original agreement in the declaration, and to have stated specially, the insertion of the marginal memorandum, and not to have treated the whole as one entire agreement. But Lord Ellenborough was of opinion, that at the time of the alteration, all was in *fieri*, and that the whole constituted one agreement. I infer his lordship's meaning to have been, in saying that all was in *fieri*, that the policy was in the course of execution and not completed.

French v. Patten, (9 *East*, 331,) arose on the same policy as *Hill v. Patten*, before quoted, in which the suit was brought by the agent. The court having there decided that the memorandum altering the policy was void for want of a stamp, the plaintiff sought to recover upon the original contract, averring the insurance to be on "ship and outfit," instead of "ship and goods," as altered; but the court were of opinion, that the alteration vacated the policy, and consequently that the plaintiff could not recover. Lord Ellenborough, *inter alia*, said—"The new agreement was complete, as far as the will of the parties could make it so, and it only wanted a circumstance which the law requires to give it its full legal effect. But, though ineffectual as an instrument to sue upon, it seems effectual to do away the former agreement, which was thereby abandoned. If this were otherwise, would it not operate as a fraud upon the revenue?" And in a subsequent part of his opinion, he said—"Is not the policy made a different policy by the memorandum, by which a different contract is substituted by the act of the parties in lieu of the former one, which they abandoned? Is it less effectual to show the intention of the parties because it is a fraud in law against the revenue? The plaintiff's own act has made, as far as he can make, the policy speak a different language from what he

now insists that it does, and he must take the consequences. I cannot say that the policy is not so altered as to have lost its original identity." The other judges concurred upon the same grounds.

NOTE XVIII.

P. 90, § 37. The new provisions of the Code de Commerce, which require that the policy shall be dated on the day on which it is subscribed, and shall mention whether the hour of subscription is before or after noon, (*Code de Com.*, Art. 332,) were recommended by the Court of Cassation, for reasons that substantially correspond with those assigned in the text. (3 *Boulay du Paty*, 261.) As these provisions are construed to mean that each underwriter must affix the date to his subscription, they have put an end to the practice that formerly prevailed in France, and which Emerigon censures as a dangerous abuse, of annexing a date only to the first subscription, and considering that as applying to all that were subsequent, thus adopting it as fixing the conclusion of the entire contract. One consequence of this practice was, that it precluded a subsequent underwriter from alleging a fraudulent concealment of facts, that when he subscribed, were known to the assured, if they came to his knowledge after the date of the first subscription. As policies were usually in the hands of the broker for several days, and sometimes weeks, before the subscriptions were closed, frauds of this description, it is intimated by Emerigon, were not unfrequent. (*Boulay Du'Paty*, *ut sup.* 262-3. 1 *Emerigon*, ch. 2, sec. 4, p. 41-2.) It is evident from the remarks of both writers, that in France the date is conclusive on the parties—a false date may vitiate the policy as a fraud, but where the contract is valid, it cannot be corrected as an error. It has always been the usage in England and in the United States, for each underwriter to affix a date to his own signature. (1 *Marsh.* 337.) And such, according to Baldasseroni, has been the invariable practice in Italy. (1 *Baldass.* 784.)

NOTE XIX.

P. 91, § 38. It is, perhaps, doubtful whether to render the clause effectual, it ought not also to contain an agreement, that no suit shall be instituted in law or equity ;(a) but the making the submission a rule of court, would probably supersede the necessity of this provision.

Mr. Philips seems to be mistaken in saying, (1 *Phil.* 23,) that the arbitration clause has very little force in France. The effect of the clause is, that either party, before the case is brought to a hearing, ("*avant contestation en cause*,"") may require that it be remitted to the decision of arbitrators. The party making the application names his arbitrator, and in case the opposite party refuses to name one on his part, the nomination is made by the judge. (2 *Emerigon*, ch. 20, sec. 1, p. 312.) It is, however, the opinion of Pothier, which Emerigon adopts, that the judge may and ought to retain the cause, if it involve questions of law, which in his judgment, the arbitrators would be incompetent to decide. (*Pothier*, *Trait. d'Assurance*, n. 199.)

NOTE XX.

P. 95, § 41. The early prohibition of wager policies, to which the text refers, is found in the Barcelona Ordinance of 1484, the provisions of which, as we have already seen, (*supra*, note 3,) were almost universally adopted by law or usage throughout southern Europe. The 9th chapter, (*Capmany*, *Append.* p. 83, c. 9. *Casaregis. il con*, p. 183, c. 10. 2 *Boucher*, 714,) exacts an oath from every person effecting a policy, that the insurance is real, not fictitious, ("*Hayan primero de jurar que aquellos seguros son verdaderos y no fingidos*,"") and that he himself, or the person on whose

(a) Vide *Halfhide v. Fenning*, (2 *Brown's C. C.* 336,) and the observations of the Lord Chancellor in *Mitchell v. Harris*, (2 *Ves. jun.* 132.)

account the insurance is made, is the owner of the vessel or goods insured. The same ordinance, from an extreme jealousy of fraud, limits the amount of an insurance on the property of subjects of Spain, to 7-8 and on that of foreigners to 3-4 of the values. (*Capman. Append. p. 80.*) It is to this ordinance that Roccus refers as an authoritative guide, in all matters of insurance, (*Roccus, n. 80.*) and yet the same writer, in a preceding note, (*n. 73.*) seems to speak of wager policies as undoubtedly valid. On this subject, therefore, the ordinance must have lost its authority. Casaregis, also, in his 4th discourse, says, that the provision of the ordinance requiring the oath of the assured, was regarded as obsolete; (*Dis. iv. c. 16, 17.*) and from the 7th discourse, in which he treats at large of wager policies, it is clearly to be inferred, that they were considered to be valid throughout Italy, except in Genoa, where they were specially prohibited. (*Dis. vii. c. 14.*)

It is stated by Emerigon, (1 *Emerig. ch. 1, sec. 1, p. 506.*) that at one period wager policies were not unusual in France, and were enforced by the tribunals; they were first prohibited by the ordinance of the marine. It is, however, remarkable that "Le Guidon" defines insurance as a contract of indemnity, and takes no notice whatever of wager policies, and it seems evident, from the observations of Cleirac, that he regarded such insurances as invalid. (*Cleirac. 182, 193.*)

I find no evidence that wager policies were ever allowed in the North of Europe. The Ordinance of Antwerp, in prescribing the form of the policy, which is only adapted to an insurance upon interest, necessarily excludes them. (2 *Mag. 231.*)

Wager policies are now prohibited in France by the Code de Commerce. In Sweden, by Art. 3 of the Ordinance of Stockholm, (2 *Mag. 25*;) in Prussia by Art. 1495 of the Civil Code, (1 *Benecke, 333, Ordinance of Koningsburg, § 10, 2 Mag. 189*;) in Amsterdam by the § 13 of the ordinance, (2 *Mag. 132*;) throughout Italy, by the adoption of the Code de Commerce, and in Spain by its new commercial code. (1 *Benecke, 328, 334.*)

OF THE
CONSTRUCTION OF THE POLICY.

LECTURE II.—PART I.

CONTENTS.

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§ 1. IN the order of our preliminary inquiries, the rules of law applicable to the interpretation of the policy are next to be considered. The construction of a policy, like that of other instruments in writing, with the exception of the cases in which parol evidence is admitted, is a question of law, the determination of which belongs exclusively to the court: and, generally speaking, it is the duty of the court to adopt the construction that in their judgment shall best correspond with the real intentions of the parties. I do not state this as a universal rule, since those conditions in a policy, that are construed as warranties, are a remarkable exception; for, in respect to these, a rule of strict and literal interpretation has unfortunately been adopted, by which, it must be confessed, the intentions of the parties are liable to be defeated. With this

exception, however, the true meaning, the actual intention of the parties, is the controlling principle from which all the special rules of interpretation flow, and to which they are all subsidiary and subordinate. These rules have no positive and arbitrary force. They are not permitted to overrule a clear and unambiguous intent, but are only so far to be followed and obeyed, as they aid us in the discovery of that which is obscure and doubtful. Indeed, they are more properly rules of logic, than of law : they embody the maxims that reason has discovered and experience confirmed, to assist the judicial mind in the search of truth ; and they derive all their authority, as well as their utility, from their fitness to attain the end proposed. Hence, when the words of the instrument, in their obvious sense, exhibit a clear and consistent meaning, it has been forcibly remarked, that the attempt to substitute a different by subtle reasoning, and a strained application of rules that are only just when subservient to the intent, is, not to interpret a contract, but to elude its performance.(a)

§ 2. It is a very just observation of a distinguished philosopher and divine, that the sense in which a promise ought to be interpreted, is that in which the person making it, meant that it should be understood, and in which it was in fact understood by the person receiving it. The actual intention of the

(a) These observations are a development of the maxim that "Ubi in *verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est,*" with which the rule adopted by Emerigon from Vattel perfectly corresponds. "qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation." (1 *Emerig.*, ch. 1, sec. 9, p. 59.) These maxims seem to be trivial, yet there are few that from design or neglect have been more frequently violated—none that a discreet judge should bear more constantly in mind. Vattel, lib. 2, c. 27.

promiser may or may not correspond with this rule, but when it differs, cannot be the measure of his moral or legal obligation. When he means to interpret his promise in a sense different from that in which he wishes it to be understood—when he means to excite an expectation that he intends not to fulfil, he is guilty of deceit, and to give effect to his intentions, would be to sanction a fraud. Nor is the promise of *necessity* to be interpreted in the sense in which it was in fact understood by the person receiving it, since he may attribute to its words a meaning that they do not properly bear, and were not intended to convey. Mutual error may, in some cases, be a ground for rescinding the contract, but the mistake of one party can never be the source of the obligation of the other. Hence, as a necessary result, that concurrent intention—that mutual consent, which is essential to a contract, is only to be found by the application of the rule that has been stated. It exists, when the promise is accepted in the sense in which it was intended it should be. (a)

§ 3. Although I am not aware that this position has yet been explicitly recognized in any judicial decision, its actual truth is implied in many of the received maxims of interpretation, and furnishes the surest explanation of their reasonableness and propriety. The consequence of its application to a contract, containing mutual stipulations, is, that each stipulation is to be construed favorably to the party entitled to claim its benefit, since it is always a reasonable presumption, not only that it was under-

(a) Paley's *Mor. and Pol. Philos.*, p. 104.

stood by him in its largest sense, but that this was the sense in which the opposite party meant he should receive it.(a)

§ 4. When no extrinsic proof is required to aid, or admitted to control, the interpretation, the construction of a policy depends substantially upon the same rules as that of other mercantile contracts; and the full exposition of these, it is evident, is more properly the subject of a separate general treatise than embraced within the scope of my present design. I shall, therefore, limit myself to a statement of a few of the leading and principal.

§ 5. As a contract of indemnity to the assured, the policy is to be liberally construed in his favor, not only because this mode of construction is most conducive to the interests of commerce, but because, for the reasons that have been stated, it is probably most consonant to the intentions of the parties. It is certain that the assured desires as ample an indemnity as he can obtain, and it is probable that the insurer means that he shall understand the indemnity given, to be as extensive as its terms, upon any fair interpretation, import.(b)

§ 6. For the same reasons, and not in obedience to a mere technical rule, an exception from the risks of the policy is to be construed strictly against the insurer. Such an exception is a modification

(a) Note I. Paley's *M. & P. Philo.*, 104. *Potter v. Ontario and Livingston Mut. Ins. Co.*, (5 Hill, 147.) *Vattel*, l. 2, ch. 17, § 267. 1 Marsh. 305. *Bacon's Maxims*, Reg. 3.

(b) Note II. *Tierney v. Etherington*, quoted by Lord Mansfield, (1 Burr. 348.) *Pelly v. Roy. Ex. Ass. Co.*, (1 Burr. 341.) *Palmer v. Warren Ins. Co.*, (1 Story, 360.) *Yeaton v. Fry*, (5 Cranch, 335.) *Blackett v. Royal Ex. Assur. Co.*, (3 Crompton and Jarvis, 244.) *Dow v. Whetten*, (1 Hall, 174.)

of the promise of indemnity, and as that promise is to be liberally construed, it is a necessary consequence, that the exception cannot be permitted to abridge its operation to a greater extent, than the terms used plainly require. In the present state of the law of insurance, it is only to new and special clauses in the policy that these rules can be considered as fairly applicable. The construction of the printed clauses, certainly of those that have long formed a part of the policy, has been fixed by usage or by judicial decisions; and it is in this, their established sense, which is frequently much less extensive than the terms import, that the parties must be presumed to employ them.(a)

§ 7. As the contract of insurance has no prescribed and definite form, but the parties are at liberty to select their own language for the expression of their meaning, the words of the policy are to be understood in their general, ordinary and popular sense, unless in cases where it is manifest from the context that they were used by the parties in a distinct and peculiar sense, which is necessary to be adopted to give effect to their immediate intent: or unless a mercantile usage, which from its nature the parties are presumed to know, and the court is bound to follow, has affixed to them a different import. We are not to adopt that meaning to which the etymology of the words, or their employment by classic writers, or the definitions of lexicographers, might alone direct us: nor that construction of a clause or sentence which a strict

(a) Note II. *Donnell v. Col. Ins. Co.*, (2 Sum. 381.) *Earl of Cardigan v. Armitage*, (2 B. & C. 197.) *Bullen v. Denning*, (5 B. & C. 842.)

attention to its grammatical structure would seem to require ; but that common and general use—“*quem penes arbitrium est et jus et norma loquendi*”—is to guide us to their true acceptation.(a) It is always a reasonable presumption that the meaning that was present to the minds of the parties is that, which the words they have used immediately suggest to the minds of others : not that which a refined and astute criticism might show them to be capable of expressing.

§ 8. In order to ascertain the intention of the parties in an ambiguous clause, we are not to limit ourselves to a mere consideration of its words, but must look at the effects and consequences of the different interpretations proposed, since there may be decisive reasons for rejecting that, which looking to the words alone, would seem to be the most natural and obvious. If the disputed word or clause by one interpretation would be clearly superfluous—would make no addition to what the contract elsewhere plainly expresses or necessarily implies, and by a *different* construction would be rendered operative and effectual, it is plainly the latter sense that in compliance with the intent of the parties, ought to be adopted—as it is improbable that they meant only to repeat what had been already sufficiently declared.(b) So a construction may be justly rejected, although justified by the apparent meaning of the words, that is in itself highly unreasonable, as leading to consequences that could

(a) Grotius. De Jur. B. & P., lib. 2, c. 16. Palmer v. Warren Ins. Co., (1 Story, 365.) Robertson v. French, (4 East, 365.) Note III.

(b) Note IV. Verba aliquid operari debent. Verba cum effectu sunt accipienda. Bacon Max, Reg. 3. Rutherford's Inst. vol. 2, p. 312.

never have been in the contemplation of the parties : where, for example, it would lead, either to such an extension of the risks of the insurer as would convert the hazard into the certainty of a loss, or such a reduction of the indemnity promised as would deprive it of all practical value, we may safely conclude that a contract so unequal and oppressive could not have been intended by the parties, and by a careful inquiry into the probable object for which the clause was introduced, must endeavor to ascertain its necessary and proper limitation. (a)

§ 9. It is the duty of the court to repudiate, if possible, such a construction of ambiguous words as would render the insurance illegal and void : an interpretation, that judging from the words alone, might seem strained and forced, may justly be preferred, when it is necessary to preserve the validity of the contract. The maxim that enjoins it upon judges to be astute in sustaining a contract—“*ut res magis valeat quam pereat*,” (b) is not merely the dictate of charity, but like all other rules of construction, in their just application, has a direct regard to the probable intentions of the parties. It is reasonable to believe that the parties did not mean to enter into a contract that either would be at liberty to rescind or abandon, and that a court, when required to enforce, would be bound to annul.

(a) Note V. *Eyre v. Mar. Ins. Co.* (6 Whar. 249.) *Dr. Longuemere v. N. Y. F. M. Ins. Co.* (10 Johns. 120.) *Ogden v. Col. Ins. Co.*, (10 Johns. 273.) *Gardner v. Senhouse*, (3 Taunt, 16.)

(b) *Verba ita sunt intelligenda ut res magis valeat quam pereat. Ea accipienda est interpretatio quæ vitio careat.*—*Qui contrahit præsumitur habere mentem, quæ congruit legis dispositioni* (*Mantica de tacitis*). Quoted by Emerigon, (ch. 2, sec. vii., p. 59.)

§ 10. In all cases before any interpretation, however natural or probable, of ambiguous words is finally adopted, we must examine how far it is supported by all the other stipulations and conditions of the policy. The true meaning of the parties must be collected from the whole instrument, not from a separate consideration of doubtful clauses. As there could not have been any repugnancy in the actual intentions of the parties—as they could not have meant that their agreement should be contradictory and self destructive, all seeming discrepancies that the examination of the whole instrument may discover, must if possible be reconciled; and even when the mode of reconciliation seems doubtful or improbable, to adopt it, is more consonant to justice and reason, than certainly to defeat the object of the parties by declaring their contract void for uncertainty. The various provisions of the policy, must, therefore, be considered and compared, and a construction be adopted that shall give effect to each and consistency to the whole; and to accomplish this, an obscure intent must yield to that which is clear, and a subordinate and particular to that which is the principal and general.(a)

§ 11. The next rule that I shall state, although in practice it is nearly limited to policies of insurance, in its principle is just as applicable to other contracts, of which there is an established printed form. When a discrepancy, apparent or real, is found to exist between a written and a printed clause

(a) *Optima fit interpretatio ex antecedentibus et consequentibus.*

“In obscuris id quod minimum est spectamur.” *Stukely v. Buller.* Hobart, 168. Note VI. (11 Rep. 34.)

of the policy, it is the writing that controls the interpretation. In such cases, the inconsistent printed clause must either be so limited or modified, as to render it consistent with the written, or if by no construction they can be reconciled, must be wholly rejected.^(a)

The reasons suggested by Lord Ellenborough for attributing a superior efficacy to the written words, command our immediate assent. The repugnant printed words, as contained in a general formula, not prepared with any reference to the immediate contract, may well have been retained from inadvertence. The written are the terms selected for the special occasion by the parties themselves, and were necessarily inserted from design. The first, may not express the intentions of the parties, the latter, certainly do.

§ 12. These are all the rules that I deem it necessary to mention, when the construction of the policy is founded solely on its language. There are many cases, however, in which extrinsic proof, by the testimony of witnesses and otherwise, is received to control or aid the interpretation : and these I shall next proceed to consider. They are properly ranged under this general division. Cases in which the evidence is *necessary* to be received, to enable the court to give any construction to the contract, that is, to understand and enforce it : and cases in which the evidence, although not necessary to a

(a) "Il est permis de déroger aux clauses imprimées, et on est censé y déroger par cela seul que les clauses écrites à la main y sont contraires." 1 Emerig. 34. *Robertson v. French*, (4 East, 136.) Pardessus, n. 792.

construction, is yet admissible to explain the real meaning of the parties.

§ 13. It is in the following cases that the evidence is necessary to give such a certainty to the contract as may render it capable of execution : 1. To fix the application of general or indeterminate words. 2. To correct an error of description by showing the identity of the subject to which it relates. 3. To remove a latent ambiguity ; and, lastly, To explain the meaning of foreign or technical words.

1. *To fix the application of general or indeterminate words.*

§ 14. The policy abounds in expressions of this character that can only be properly applied or limited, by a knowledge of the subject to which they relate. Thus, where a policy is effected on goods, "for whom it may concern," or on a vessel "on account of owners," it does not enure to the benefit of all, who have an interest in the cargo, or are part owners of the vessel, but is confined to those, for whom the insurance was intended, and by whom it is shown to have been authorized or adopted. So when a vessel is insured "at and from" a particular port, the word "at," as defining the period when the risks are to commence, is indeterminate. Its interpretation is not fixed by any uniform and positive rule, but depends upon the actual situation of the vessel at the time the insurance is effected. If the vessel is then in the prosecution of a voyage to the port where the risks are to commence, the policy will attach immediately upon her arrival, or if there is an insurance upon that voyage, by which she is fully covered, as soon as that policy expires ; but if the vessel, when the insurance is made, is and for

a long time has been, in the port where the risks are to commence, the word "*at*" will not be construed as relating to her first arrival, but the policy will only attach from the time she begins her preparations for the voyage insured.^(a) And if the vessel be not in a foreign but in her home port, at the time of the insurance, the words "*at and from*" have no retrospective force, but the risks commence only from the date of the policy. It is evident that in these and in all similar cases, as the policy is silent as to the facts upon which the construction depends, they must necessarily be shown by evidence, or the contract of the parties, when its execution turns upon the construction, would be defeated.

§ 15. It has been suggested by an eminent judge,^(b) that there is an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, that exists, where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties; and he expresses the opinion that in such cases parol evidence may be admitted, to show the circumstances under which the contract was made, and the subject matter to which the parties referred. He selects, as an instance, the word "*freight*," which has several meanings in common parlance, and adds, that if by a written contract a party were to assign his freight in a particular ship, parol evidence of the circumstances under which the contract was made, would in his

(a) *Seaman v. Loring*, (1 Mass. 127.)

(b) *Mr. J. Story*, in *Feisch v. Dixon*, (1 Mass. 10).

ferred to goods on board of the ship, or an interest in the earnings of the ship ; in other words, to show in which sense the parties intended to use the term.

The propriety of admitting parol evidence in the cases to which the learned judge refers, cannot reasonably be doubted, but it is under the present head, if I mistake not, that the cases themselves are logically to be ranged. All words that may consistently be applied to different subjects, unless the sense in which they are used is fixed by the context, are indeterminate : nor can their just application in any case be otherwise known than by a knowledge of the subject, derivable only from extrinsic proof, to which they were intended to refer. To reject the evidence is to annul the contract by converting a venial and easily removeable uncertainty into a fatal vice.

§ 16. There is, however, an apparent objection to the admission of parol evidence in these cases, that is necessary to be stated and considered. Words that may consistently be applied to different subjects, where the meaning intended by the parties is not manifest from the context, are of necessity ambiguous, since it is in this possible variety of their application that the ambiguity of single words alone consists ; nor can it be denied that the ambiguity from its nature is patent ; that is, apparent upon the face of the instrument. Hence the admission in these cases of parol evidence to ascertain the sense intended by the parties, it may be said, is necessarily a violation of the rule, that declares, that such evidence can never be received to explain a patent ambiguity. The reply to the ob-

jection is that the cases in question, although embraced by the letter, are not within the spirit of the rule. The object of the rule is to exclude the hazard of the virtual substitution of an oral contract, for that which should be contained in the written instrument, and the evidence that it proscribes, relates to the terms of the agreement, not to its subject. The rule, therefore, is not applicable when the evidence sought to be introduced relates, not to the acts and declarations of the parties as evidencing the nature of their agreement, but, solely, to extrinsic facts that by themselves determine the construction that ought to be adopted, and from their nature must have been, in the understanding of the parties, the basis of their contract.(a)

Upon an attentive examination of the cases in relation to other contracts, as well as that of insurance, we shall see no reason to doubt the truth of the general position, that all indeterminate words, in a policy, for the same reasons as the words "at and freight," may properly be explained and limited by parol evidence, when the nature of the evidence is to designate with certainty the subject to which the parties intended to refer.(b)

(a) Vide 1 Greenleaf on Evid. 341, and cases, *ib. cit.*

(b) The reader is referred on this subject to the chapter upon the admissibility of parol evidence, in the most recent and far the ablest treatise on evidence that has yet appeared—that of Professor Greenleaf of Cambridge, who has collected the decisions with exemplary diligence, and arranged them with admirable skill and judgment, (1 *Greenleaf*, p. 2, ch. 15, p. 327—379.) It will be seen that the views of this writer correspond with the positions of the text, and that the cases are almost innumerable, in which extrinsic, frequently parol evidence, is admitted to explain a patent ambiguity. In truth, often as it has been repeated, no proposition considered as general, is more erroneous than that adopted by Mr. Starkie, "that parol evidence is never admissible to explain an ambiguity that is not raised by extrinsic facts." (*Starkie on Evidence*, pt. iv. p. 1001.)

§ 17. Nor is the evidence of extrinsic facts limited to the interpretation of particular words ; it may equally be received where an entire clause or provision is indeterminate and ambiguous. That where the true construction is doubtful upon the face of the policy, the doubt may be resolved by evidence of a usage, it will be seen hereafter, is the admitted and established law ; and I apprehend, that when the evidence of the intentions of the parties, arising from extrinsic facts, is equally certain, it is always to be admitted for the same purpose.

§ 18. Thus, in a case where it was doubtful upon the face of the policy, whether its terms extended to cover a voyage to China, or were limited to ports in the East Indies, it was held by Lord Mansfield and the King's Bench, that in determining the construction that ought to be adopted, it was a fact material to be considered, whether a higher premium would have been demanded had China been expressly named in the policy. That is, a higher rate of premium, as an extrinsic fact evidencing the intentions of the parties, would have removed the ambiguity raised by the words of the contract.(a)

2. *To correct an error of description by showing the identity of the subject to which it relates.*

§ 19. The ancient maxim, that "*error nominis nunquam nocet si de identitate rei constat*," that a mistake in the name is never prejudicial, when the thing intended is certainly known, is properly applicable only when the means of correcting the mistake

(a) *Preston v. Greenwood*, (4 Doug. 28,) evidence of a usage was admitted in the same case, and was decided to be just as applicable to the written as the printed words of the policy, (1 *Green. on Evid.* 337—341, § 286—288.)

are apparent on the face of the instrument to be construed. It was never meant to sanction the correction of mistakes by the application of extrinsic proof. It is a settled rule that in cases exempt from fraud, oral evidence cannot be admitted in a court of law to contradict a written instrument, and it is a necessary consequence, that such a court cannot listen to the allegation of a mistake, that is only to be established by setting aside the express words of the instrument, and substituting others of a different import.

§ 20. There are, however, two cases in which it is competent to a court of law to rectify upon parol evidence, or more properly speaking, to disregard, an error in words of description in a policy ; but these cases involve no violation of the general rule, since the exercise of the power is sanctioned by the express words of the contract. When the ship to which the insurance relates is described in the policy as the ship A, and the master by the name of A. B., with the usual addition of the words, "*or by whatever other name or names the said ship, or the master thereof, is or shall be named or called,*" a mistake in the name of the ship or master as inserted in the policy, will not vitiate the insurance, when it clearly appears that the error was undesigned, and did not prejudice the insurer by increasing the risks he meant to assume ; for it is against the possible occurrence of such mistakes, that the special words added to the description in the policy were meant to provide. What is the proper construction of the clauses to which I have adverted, and with what limitations they are to be understood, will be subjects of future inquiry. I refer to them at present, merely as evidence that in

some cases, the correction by extrinsic proof of an erroneous description is permitted, and is necessary to give effect to the policy.^(a)

§ 21. But, although it is only in the preceding cases that an absolute mistake can be rectified by extrinsic proof, yet, as already intimated, when a description is only partially erroneous, and the means of correcting the error are in a great measure supplied by the policy itself, I doubt not, that parol evidence, showing the knowledge and intentions of the parties, may properly be received. Thus, where the vessel insured, her name and that of the master being correctly given, is described improperly as a ship, when in truth she is only a brig or brigantine, if it is clearly proved that her true character and denomination were disclosed or known to the insurer, I apprehend, that the error, otherwise certainly fatal, would be regarded as immaterial. The identity of the subject is here proved by the agreement of the name of the vessel and that of the master with those stated in the policy, and proof of the knowledge of the insurer is only requisite to show that he was not deceived or misled, but truly understood the risks he meant to assume. Although I am not aware of any direct authority in our own books, the consentient judgment of foreign jurists is in favor of the opinion I have expressed; and should the question arise in our own courts, would probably be admitted to control its decision. To compel the assured in such a case to seek the aid of a court of equity, would seem, in an eminent degree, oppressive and unjust.^(b)

(a) *Le Mesurier v. Vaughan*, (6 East, 382. 1 Mars. 313.)

(b) 1 *Emerigon*, ch. 6, § 3, p. 161. "Si les assureurs savaient sur

3. *Parol evidence may be received to remove a latent ambiguity.*

§ 22. The terms of an instrument in writing may be absolutely clear and unambiguous, yet when the instrument is sought to be enforced, an uncertainty may arise from extrinsic facts, that, unless removed, would defeat its execution. It is this species of uncertainty that the law terms a latent ambiguity. It would not be possible to enumerate all the ambiguities that may be thus concealed in the provisions of a policy, and the enumeration, were it possible, would be useless. To illustrate the nature of the uncertainty that they create, and the necessity of its removal, I shall content myself with a single instance. A vessel is insured on a voyage to a foreign port. On the trial of an action for the recovery of a loss on the voyage, it appears in evidence that there are two ports of the same name to which the description in the policy may equally be applied, and to remove the doubt arising from the fact, evidence is offered on the part of the assured that the port, to which the vessel actually sailed, was that intended by the parties. Certainty, as to the port of destination, is essential to the validity of an insurance. Hence, to reject the evidence, would be to rescind the contract. Its admission gives to the assured the indemnity that his policy was meant to secure to him.(a)

"quel navire ils prennent risque, peu importerait qu'on lui eût donné une fautive qualification. C'est alors le cas de dire que la fautive démonstration ne nuit point : Falsa demonstratio non nocet." *Casaregis Dis.* 1, n. 30. 2 *Benecke*, 267. *Baldasseroni*, tom. 1, part 2, tit. 2, § 3—8. Mr. Marshall adopts the opinion of Emerigon, vol. 1, 315.

(a) In the case of *Carruthers v. Sheddon*, (6 Taunt. 14,) the insurance was made on account of *Dowrick & Co.*, and as there were two sets of

§ 23. There is this resemblance between indeterminate words and latent ambiguities, that, in both cases, the uncertainty arises from the fact that the words used may, with equal propriety, be applied to different subjects. The distinction is, that in the first case the ambiguity is apparent on reading the policy; in the second, it is raised from extrinsic facts, and is only revealed when they are given in evidence.

§ 24. The necessity of going out of the policy for the explanation of foreign words, where such happen to be used, or words purely technical, of which the legal import has not been fixed, is too apparent to require any observations. Words not forming a part of that common language which judges are bound to understand and interpret, must of necessity be translated or explained, to enable the court to give them any effect.

§ 25. Thus, where a policy contained a warranty that the vessel to which it related, should be provided with a "sea-letter," it was justly decided by the court of errors in New-York, that if the legal import of the words "sea-letter," had not been fixed by treaties of the United States, or by acts of Congress, parol evidence, to show in what sense they were used by ship-owners and merchants, and what was the nature of the document to which they were applied, ought to have been received. (a)

§ 26. The numerous cases in which parol evi-

partners trading under that name, parol evidence was admitted to show to which the insurance was meant to apply—that is, to remove the latent ambiguity.

(a) *Sleight v. Hartshorne* and others, (2 Johns. R. 531.) Greenleaf on Evid. ed. 1844, 888, and cases, *ib. cit.* *Attorney General v. Shaw*, (11 Sim. R. 592.) Note VII.

dence, although not necessary to give such a certainty to the contract as may render it capable of execution, may yet be received to explain the true meaning of the policy, involve questions of some difficulty, and proceed upon reasons, that, upon the first consideration, are by no means apparent. The subject, on which there is some confusion and much obscurity in the books, is of real and wide importance; it requires and will justify a careful discussion.

§ 27. It is a general rule, that parol evidence can never be received to contradict or materially vary the terms of a written agreement; and the rule, properly explained, is wise and salutary, and universally true; but if its terms are understood, as too frequently they have been, in their literal and broadest sense, they plainly exclude the admission of parol evidence in most of the cases in which, in respect to a contract of insurance, it is usually received. The effect of the evidence in all cases, in which the terms of the policy, without its aid, may be sensibly interpreted, is to vary, and vary materially, the contract of the parties in its legal construction. The general object of its introduction, is to compel or justify a construction, that otherwise could not have been adopted, so as to enable the assured to recover for a loss, that the policy in its ordinary interpretation would not have covered.

The true meaning of the rule, excluding parol evidence, is, that such evidence shall never be received, to show that the intention of the parties was directly opposite to that which their language expresses, or substantially different from any meaning that the words they have used, upon any construc-

tion, will admit or convey. If from mistake or fraud, an agreement is so defective, that instead of conveying the meaning of the parties, it expresses a different or hostile intent, it is in a court of equity that relief, if it can be given at all, must be exclusively sought. A court of law must act upon the agreement as it is : it cannot strike out the words employed and substitute others of a different import ; it cannot change the language of the parties : but there are cases in which the language of a policy, in entire consistency with the rules of law, may be interpreted in different senses, or with a modification, which, although not expressed, is implied ; and in such cases, parol evidence may be admitted to determine the construction that, following the intention, ought to be adopted. The admission of the evidence violates the letter, but not the spirit of the rule, by which parol evidence is forbidden ; it varies the construction of the contract, but does not contradict or vary the agreement contained in the policy ; on the contrary, it ascertains its true import.(a)

(a) The observations of Mr. J. Thompson, in *Renner v. The Bank of Columbia*, (9 Wheat. 587,) relative to the grounds upon which a usage is admitted in evidence, correspond with the views stated in the text. "It is said, however, that the effect of this testimony is, to alter and vary by parol evidence, the written contract of the parties. If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view ; for there is no rule of law better settled, or more salutary in its application to contracts, than that which precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character, but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom ; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract, and it rests upon the same principle as the doctrine of the *lex*

§ 28. The cases in which parol evidence may thus be received, to vary the legal construction, but ascertain the true meaning of the policy, may be divided into three classes. In the first, the evidence relates to a mercantile usage. In the second, to extrinsic facts, showing the words to be interpreted to have been used by the parties in a distinct and peculiar sense ; and in the last, to the representations of the assured.

§ 29. It has been seriously doubted by eminent judges, whether a usage, not adopted nor referred to in the policy, ought ever to be permitted to control its interpretation ;(a) nor shall we be surprised that these doubts have been expressed, when we advert to the fact, that too frequently the evidence of a usage, that has been suffered to prevail, is in an eminent degree, vague and inconclusive. Yet, the propriety of receiving the evidence when subject to its just limitations, is readily conceded ; and where a due vigilance is exercised by the judges, and the proper criteria for estimating the value of the evidence, firmly applied, the hazard of injustice from its introduction is too slight to deserve attention. The wise caution, however, of Mr. Justice Story, is never to be forgotten, that the proof is always to be admitted "with cautious reluctance, and to be watched with scrupulous jealousy."(b)

loci. All contracts are to be governed by the law of the place where they are to be performed ; and this law may be, and usually is, proved as matter of fact. The rule is adopted, for the purpose of carrying into effect the intention and understanding of the parties."

(a) Lord Holt in *Lethullier's case*, (2 Salk. 443.) Lord Eldon, in *Anderson v. Pitcher*, (2 Bos. & Pull. 168.) And vide the strong observations of Mr. J. Story, in the case of the schooner *Reeside*, (2 Sumn. 567,) and in *Palmer v. Warren Ins. Co.*, (1 Story, 360.)

(b) *Rogers v. Mech Ins. Co.*, (1 Story, 607.)

§ 30. It is not to be denied, that no interpretation of the policy can be justly adopted, which fails to correspond with the probable intentions of the parties. Hence, where the evidence of a usage tends to substitute a conjectural or doubtful intent for that which the policy plainly expresses, a decisive instruction to reject it should be given to the jury, and when the admonitions of the judge are disregarded, they should be enforced by the subsequent action of the court. The evidence ought never to be allowed to control the decision of a jury, unless the usage that it establishes is of such a character, as fully to sustain and justify the presumption, that it was known to the parties, and that their contract was framed in reference to its existence. It is upon the legitimacy of this presumption, that the propriety of receiving the evidence solely depends, and when it exists, the hazard of defeating the intentions of the parties, by the rejection of the usage, will evidently exceed that resulting from its admission. What are the requisites, applying this criterion, of a valid usage, will be a subject of future inquiry. I shall first attempt to distinguish the several kinds of usage, of which evidence may be received, and to state the rules specially applicable to each.

§ 31. 1. Parol evidence may be admitted, to show that particular words, upon the construction of which a controversy turns, have acquired, by the known usage of trade, a peculiar meaning, wholly distinct from their ordinary and popular sense. This commercial meaning the court will adopt, as that intended by the parties.

§ 32. The propriety of receiving parol evidence, in the cases to which this rule refers, is sufficiently

manifest, and will scarcely be doubted. Insurance is eminently a mercantile contract. It is the language of commerce that the policy speaks, and is intended to speak. Hence it is always a *legitimate* presumption, that the words of the policy are used by the parties in the same sense that they usually bear in other mercantile transactions; and where the meaning, thus attributed to them, differs from their ordinary and popular sense, it must of necessity be shown by parol proof. The evidence is merely explanatory, and the reasons for its admission are precisely the same, as if the words to be interpreted were purely technical, or belonged to a foreign language. It is in their commercial and technical sense that the law presumes them to be employed, and that this may be adopted and enforced it must be proved. In considering the nature, and in estimating the value of the evidence by which the meaning of words, as resulting from the usage of merchants, is to be established, there are two observations that are necessary to be borne in mind: First, that the usage to be proved must be a *mercantile* usage in the proper sense of the term; and secondly, that its existence must be established as a fact, and is not to be inferred from the mere *opinions* of witnesses. These observations, from their practical importance, demand a full elucidation.

§ 33. It is not to trade in the largest sense of the term, as embracing every sale and exchange of commodities, that the policy relates; but solely to that export and import trade which is conducted by navigation; and it is therefore a knowledge of the usages of this trade, that can alone be justly imputed to the insurers. They are bound, and are therefore

presumed to know, what is the meaning that merchants, concerned in the trade to which an insurance relates, usually affix to the words that in the prosecution of that trade they are led to employ; and where such words are introduced into a policy, they must presume that they will be understood by the merchant effecting the insurance, in the sense in which alone he has been accustomed to use them. But when the technical meaning, sought to be attributed to the words, is derived from the usage not of importers, but of domestic traders or manufacturers, the presumption that this was the meaning intended by the policy wholly fails. There are no grounds whatever for imputing to the insurer the knowledge of a usage thus limited and peculiar; nor for the supposition that the parties in framing their contract referred to its existence, and meant to adopt it. When such a usage coincides with that of the importing merchant, the proof of its existence is superfluous and irrelevant: when it differs, to permit it to govern the construction of the policy, is to change the contract of the parties, in utter disregard of their probable intentions.

It is not against an imaginary error that these observations are directed. A case has occurred in a court of high authority, in which the evidence that these observations, if just, would exclude, was in fact received, and seems to have influenced the decision. The probable source of the error was a misapplication, by an undue extension, of the equivocal words "usage of trade."^(a)

§ 34. No position is more certainly established

(a) Vide Note VIII. *Astor v. The Union Ins. Co.*, (7 Cowen, 202.)

upon authority, or upon principle, more easily defended, than that the opinions of witnesses, as to the proper interpretation of those words, in a policy that are neither foreign nor purely technical, cannot be received as legal evidence; yet it is to the frequent violation of this salutary rule, I am forced to believe, that the confusion and uncertainty, in which the subject of the proper influence of a usage on the construction of the policy is partially involved, is mainly to be ascribed.^(a) When the inquiry relates to the proper application of a doubtful word, the distinction between an interpretation settled by usage, and one resting *only* on opinions, is certain not to be known or understood by the witnesses and jurors, and is too often forgotten, or not enforced by the judge. Hence, the first answers of the witnesses will naturally express no more than their own understanding and belief, and when they fail to show by facts, that there is an existing practice, corresponding with their belief, their testimony amounts to no more than the declaration of an opinion, which, whatever may be the number of those, who concur in expressing it, should be wholly withdrawn from the consideration of the jury. The existence of a usage, whatever may be the nature of the subject to which it relates, is, in all cases, a fact: a complex fact, it is true, resulting from a variety and a succession of individual acts, but still a fact, to be proved like all other facts, by the testimony of witnesses speaking from their personal knowledge. It is not created

(a) Note IX. *Syers v. Bridges*, (Doug. 539.) *Crafts v. Marshall*, (7 Car. & Payn. 597.) *Winthrop v. Union Ins. Co.*, (2 Wash. C. C. R. 16.) *Rogers v. Mech. Ins. Co.*, (1 Story, 607.)

by hypothetical opinions, but by actual practice, and can only be established by a series of *acts* of similar character and import, performed at different times, by different persons. It is to these acts, that the testimony, properly restrained and directed, should be strictly confined, and it is upon their number, uniformity and notoriety, that the weight and value of the evidence solely depend. Hence, where a witness swears, generally, that a particular usage exists, yet is unable to state from his own knowledge any instances of its actual observance, his testimony should, at once, be rejected; and it is only by a strict adherence to this rule, that the important distinction between the evidence of opinions and belief, and that of facts, is possible to be maintained. To illustrate these remarks—Let us suppose the inquiry to be whether the word “skins,” which is one of the articles exempt from average under the common memorandum of the policy, has acquired by the usage of trade a distinctive meaning, restricting it to those skins that are valuable, not for the fur, but solely to be dressed as leather. A number of merchants, importers of skins, are examined as witnesses, and all concur in saying that this restricted meaning in their understanding, and, they believe, in that of all the trade, is the proper and usual import of the word. The testimony is imposing, and at first seems conclusive, yet, if unsupported by specific facts, would, in truth, be valueless. But should the witnesses proceed to say, that not only was such their understanding of the meaning of the word, but that for a long time anterior to the insurance, in bills of lading, invoices, contracts of sale, and other mercantile instruments, it had

been used, and was practically interpreted by the parties interested, in this restricted sense, and in no other, the proof of a usage, supposing the testimony to be uniform and uncontradicted, would be complete; and the presumption, that the commercial meaning thus established, was meant to be adopted in the policy, would certainly attach. I state, therefore, as the general conclusion, that the question, whether a particular word in a policy has acquired by the usage of trade, a technical meaning, distinct from its popular sense, is always to be determined by the inquiry, whether such has been its use and practical interpretation, in other mercantile instruments and contracts, since it is only from the repetition and uniformity of these, and similar acts, that a usage, in the proper sense of the term, can arise.

§ 35. Between the cases embraced under the present head, and those relative to indeterminate words and latent ambiguities, there exists this analogy, that, in all, the words to be interpreted may be understood in different senses. The circumstance in which they differ from the first is, that there is no ambiguity on the face of the policy: and from the second, that the ambiguity disclosed by the evidence is removed, not by direct proof of the intentions of the parties, but by a presumption of law.

I shall close this discussion by stating a few cases, in which the rule, that we are considering, has been applied.

§ 35. Corn is one of the enumerated articles in the memorandum of the policy, that exempts the underwriters from a partial loss: nor can it be doubted that this general term, not only by its scien-

tific definition, but in its popular sense includes "rice," yet where a clear usage to the contrary was proved, the witnesses all concurring, the underwriters were held to be liable for a partial loss.(a)

In the language of science and geography, with which the general acceptance of the words coincides, the Gulph of Finland is not considered as a part of the Baltic, but as a distinct sea ; yet, where a vessel insured to a port or ports in the Baltic, proceeded to a port in the Gulph of Finland, it was held to be no deviation, it being clearly proved, that in licenses to trade and other *mercantile instruments*, ports in the Gulph of Finland were construed to be well described, as ports in the Baltic.(b)

So in a subsequent case, Mauritius, or the Isle of France, which is properly an African island, was held to be included in a policy covering a voyage to islands in the East Indies, it being proved that by the usage of trade, as evinced by the practical interpretation of other mercantile contracts, it was known as an East Indian island.(c)

§ 37. 2. When the interpretation of words, or the construction of a clause in the policy, that may be understood, in a sense more or less extensive, has not been fixed by judicial decisions, parol evidence may be admitted, to show, whether they have obtained by use and practice, between the assurers and the assured, any, and what known and definite import. The usage if proved, will *govern* the construction.

(a) Scott v. Bourdillon, (2 Bos. & Pul. 215.) Vide Note X.

(b) Uhde v. Walters, (3 Camp. 16.)

(c) Robertson v. Clarke, (1 Ryan & Moo. 75. 1 Bing. 445.) Vide also Note X. Astor v. Union Ins. Co.

I have borrowed, for the expression of this rule, the language of Lord Ellenborough, which as usual is recommended by its clearness and precision.^(a) And in the application of the rule, the material words "use and practice," and "known and definite" import, should be constantly present to the mind. It is in reference to the direct interpretation of the policy, that the abuse (to which Mr. Justice Story has adverted in terms of singular force,^(b)) has chiefly prevailed, of permitting the question to be determined by the jury, upon the loose and inconclusive testimony of witnesses, whose notions are vague and whose knowledge imperfect. It is here that the mistake is most frequently committed, of substituting the understanding and belief of witnesses, in place of that "use and practice" that the rule requires; thus giving to private and unauthorized opinions, the effect of a known and definite usage. Should a new clause be introduced into a policy, and all the merchants and all the insurers of the city in which the insurance is effected, unite in declaring that it ought to be interpreted in a certain manner, their testimony, if unsupported by facts, could not justly be permitted to vary the construction, that it would otherwise be the duty of the court to adopt. Where the terms of the clause, in their plain and ordinary sense, exhibit a consistent meaning, that meaning must prevail, unless it can be shown that it ought to be modified and controlled by a positive usage; and the concurrent opinions of any number of witnesses would be unavailing to prove that such

(a) In *Parr, v. Anderson*, (6 East 207.) Vide Note XI.

(b) In the case of the *Schooner Reeside*, (2 Term, 567.) In *Rogers v. Mech. Ins. Co.* (1 Story, 609.) Vide Note XI.

a usage, in fact, exists. They would only prove that in their judgment it ought to exist. In this, as in all other cases, the usage is only to be established by proof of distinct and successive acts. The proper and sole inquiry is, what has been the interpretation in practice of the same words or clause in former policies? What claims have been preferred by the assured, and how have they been adjusted by the insurers? What construction has been followed in the settlement and payment of losses? If no claims have been adjusted, no losses paid or refused to be paid, there has been no use or practice whatever, in the interpretation of the words or clause; and where instances of practical interpretation are proved, the question still remains, whether they have been so frequent and so general, as to have given to the words or clause, a known and definite import, in reference to which, the parties may be justly presumed to have formed their contract.

§ 38. Even thus restricted, this mode of interpreting a contract by a reference to the practice of other parties in similar cases, is almost peculiar to a policy of insurance, nor is it easy to be reconciled with the ordinary rules of evidence: yet the causes are obvious from which the seeming anomaly has sprung, and when they are considered, the original propriety and even necessity of receiving the evidence, will be manifest. Marine insurance in England, not only in its origin, but for centuries after its introduction, was essentially and almost exclusively, a custom of merchants, and the rules of insurance law were no other than those by which merchants and insurers, in the interpretation of the contract, and in the settlement of losses,

were usually governed. Of these rules, when insurance cases began to be heard with some frequency in the courts of common law, (a period not long anterior to the elevation of Lord Mansfield to the King's Bench,) the judges were necessarily ignorant: they were not to be found in the reports, and were loosely and only partially stated in the imperfect treatises then existing. Hence, the judges were under the necessity of deriving their information from the testimony of witnesses, of experience, and skill, who could testify to their own and the general understanding and practice: just as judges are now compelled when the question to be determined, depends upon the rules of a foreign law, to resort to the testimony of witnesses possessing the knowledge in which they are deficient. To the judges of that day, the law of insurance was substantially foreign.

The necessity, under which the judges acted, was much increased, during the period to which I refer, by the loose and inaccurate manner in which the policy is drawn. It contains many vague and indeterminate expressions and clauses, that if taken literally might increase indefinitely the risks of the insurer, or diminish unreasonably the indemnity of the assured; or, if in view of these consequences, a literal interpretation was rejected, might render the contract void for uncertainty. It was evident, that to render these expressions and clauses operative at all, it was necessary that they should be understood, some in a limited, others in an extended sense; and equally so that the existing usage—the established practice—would furnish the best and surest evidence of the limitations or additions that

were necessary or proper to be implied. From these combined causes the practice arose, and for a long time prevailed, of trying all insurance cases by special juries of merchants, and of determining them principally upon the evidence of witnesses, who, from the nature of the pursuits in which they were engaged, were practically conversant with the subject; and it is by this process, that the law of insurance, as resting upon express decisions, superseding the necessity of a resort to usage, was gradually formed, and has attained the systematic excellence by which it is now distinguished.^(a) During the last century, the construction of nearly all the usual words and clauses of the policy has been fixed by positive adjudications; but as new clauses may from time to time be introduced—and in the American policies, many such have been introduced—the necessity of resorting for their interpretation to that species of evidence, which is authorized by the rule we are considering, may frequently arise, since it is manifest, that all such clauses may obtain by use and practice a known and definite import, before they become a subject of legal controversy and discussion.

§ 39. The facts by which a practical interpretation of the policy is to be shown, are essentially distinct from those by which the commercial and technical meaning of disputed words ought to be established. In the latter case, the evidence relates to

(a) In *Brough v. Whitmore*, (4 Term R. 208,) Lord Kenyon repeats and adopts the observation, that “if Lombard-street had not given a construction to policies of insurance, a declaration upon a policy would have been bad upon a general demurrer, but that the uniform practice of merchants and underwriters had rendered them intelligible.”

the customary use and interpretation of the words in other mercantile instruments and contracts. In the first, it is limited to the acts constituting the use and practice of the assurers and the assured in former and similar contracts. The two modes of proof may and frequently do coincide, and when this coincidence exists, it strengthens greatly the conclusion that the evidence is designed to establish; but there may also be a direct conflict between the usages, as proved; and when this occurs, it cannot be doubted, that the usage, arising from the immediate and mutual acts of the assurers and the assured, ought to prevail. The presumption that the parties meant to employ the doubtful words in their commercial sense, is effectually repelled by proof, that in the actual settlement of losses a different meaning had been uniformly given to them. When the commercial sense of a word differs from its popular, it is the first that was probably intended by the parties, and hence the law adopts it; but it is always most probable, that the parties intended that their own contract should be interpreted by the rules, that they knew to have been followed in all similar cases. Hence, it is in reference to the usage thus established that their contract should be presumed to have been made. Should a total loss be claimed upon "fur skins," described in the policy by the general name of "skins," the underwriters would certainly not be permitted to evade its payment by proof that the word skins in its commercial sense excludes "fur skins," if it clearly appeared that in former and in numerous instances where the words and the subject of the insurance were the same, total losses had been claimed, and had been uniformly paid. The reply to the insurers

and their defence would be conclusive. "It is the meaning of the word in policies, not in bills of lading and in invoices, that is to govern your contract; and you knew, or were bound to know, that in the policy, it has always been used in the sense that renders you liable."

§ 40. It is by no means unnecessary to be remarked, that a controlling usage, in the interpretation of the policy, may as well result from a constant refusal, on the part of the underwriters, to admit their liability for losses, for which, upon a different construction of doubtful(*a*) words, they would be liable, and the acquiescence of the assured in such refusal, as from the admission of their liability in a constant settlement of the claims of the assured. The proof from its nature is more difficult in the one case than in the other, but it is equally competent, and the usage that it establishes, equally conclusive on the parties. The insurer must have the same right to protect himself by a usage that diminishes his liability, as the assured to support his claim by a usage that increases the risks of the policy, as they would otherwise be construed.

Thus, selecting for illustration the instance before given, but reversing the proof given by the parties. The assured under a policy upon goods generally, or upon "furs," claims a partial loss upon "fur skins" upon the ground that they are not included in the commercial meaning of the word "skins," which are exempt from average under the common memorandum, and he clearly proves that

(*a*) Throughout this discussion, I mean, by doubtful words, those in respect to which a doubt is attempted to be raised by the evidence, not as implying that they are ambiguous upon the face of the policy.

by the known usage of merchants, such is the restricted meaning of the term. The claim of the assured would be effectually repelled by evidence on the part of the insurer, that although under similar policies, losses upon "*fur skins*" had frequently occurred, yet such losses when *partial* had never been paid: that in many instances, when payment was demanded, it was refused, and in none had the assured attempted to enforce his claim, and that the construction thus given to the memorandum was so well known, that most frequently when losses occurred, no claim for reimbursement was advanced. This evidence would be just as conclusive to show that the term "*skins*" was used in the memorandum in its largest sense, as the evidence in the case, first stated, that it was used in the same sense, to describe the subject insured.

§ 41. I shall conclude my observations under this head, by the statement of a few cases in which the evidence of a usage, in the interpretation of the policy, has been permitted to govern the construction, or from its insufficiency has been rejected.

By the common memorandum of the policy, the underwriters are not liable for a partial loss upon "*corn*," under which general term, peas are held to be included. A total loss was claimed upon a cargo of peas that had arrived at the port of destination, but so damaged by the perils of the voyage, as to be utterly worthless to the owner, the sum produced by a sale not being equal to one fourth of the freight. The defence was, that by an established usage fixing the construction of the memorandum, "The underwriters are never liable for a loss upon memorandum articles that arrive at their

destined market, even when they have sustained damage equivalent to a total loss, and a number of witnesses *conversant with settling losses*, proved that the usage in all such cases was to hold the underwriter discharged. As the testimony was uniform and uncontradicted it was held to be conclusive, and a verdict, under the instructions of Lord Mansfield, was given for the defendant.(a) The usage in this case, it will be observed, operated in favor of the insurer, and was deemed to be sufficiently proved by the occurrences of losses that the underwriters had refused to pay, or the assured omitted to claim. In a case where the question to be determined was, whether the underwriters were liable for a loss upon the ship's stores and provisions, under a general policy upon the ship and her furniture, the opinion of the court in favor of the assured, seems to have been chiefly founded upon the usage, admitted or proved, that the term "furniture" comprehended provisions; and one of the judges, (Mr. J. Buller,) remarked, that it was clear that, in every instance, *when losses had been settled*, this construction had been followed. It was in this case, that the same eminent judge made the strong observations, that although a policy of assurance had always been considered in courts of law, as an absurd and incoherent instrument, yet it was founded upon usage, *and must be governed and construed by usage.*(b)

Where a policy upon an armed ship contained the words, "with liberty to cruise for six weeks," a number of witnesses were examined to prove the

(a) *Mason v. Skurray*, (1 Marsh, 226. 1 Park. 253.)

(b) *Brough v. Whitmore*, (4 Term, 206—216.)

true interpretation of the clause, but none of them could prove a usage ; none of them having known any case similarly circumstanced. Upon the argument for a new trial, the court decided, that the testimony being that of mere opinion, ought not to have been received, although it had probably had great weight with the jury. The verdict was set aside, the court rejecting as erroneous the construction that the jury had followed.(a)

By the usual memorandum in the New-York policies, "roots," among other articles, are exempt from the payment of any partial loss, not arising from a general average ; and upon this ground, the underwriters in that city resisted the payment of a partial loss upon "sarsaparilla," which is a root, in the general sense of the term. To support his claim, the assured offered to prove, that by the usage of the merchants and insurers in New-York, the word "roots," as used in the memorandum, was considered to be confined to *roots*, perishable in their own nature, and hence that sarsaparilla, which, although a root, is a durable substance, as imperishable as mahogany, was not considered to be included in the memorandum. The evidence was rejected by the judge on the trial, and the defendants obtained a verdict ; but this was set aside by the Supreme Court, and a new trial granted with a view to the admission of the rejected evidence. The offer in this case, as stated to have been made on the trial, was somewhat loose, and seems to have involved the common mistake of seeking to build a usage upon opinions, and not upon facts ; but the

(a) *Syers v. Bridge*, (Doug. 527.)

Supreme Court, in granting a new trial, corrected the error, for adopting the very words of Lord Ellenborough, they limited the evidence to be given to a known usage of trade, or the use and practice between the assurers and the assured.(a)

These are not all the cases to be found in the reports in which proof of a usage, resulting from a practical interpretation of the policy, has been admitted; but they are sufficient to sustain the observations that have been made, as to the nature and import of the evidence that may be received, and the rules by which its competency and effect should be determined.

§ 41. The cases that are embraced in the rule, next to be stated, are those in which the usage that is allowed to be proved is "a usage of trade," in the appropriate sense of the words; and in order to mark a distinction that really exists, it is to this sense, that I shall endeavor to adhere in my subsequent use of the phrase.

§ 42. 3. If by a general practice the voyage or trade to which the insurance relates, has been pursued, in a certain course or manner, that the terms of the policy, in their ordinary interpretation, would not embrace, parol evidence may be admitted to prove the existence of the usage. Where the usage is established, it becomes a part of the contract, and has the same effect upon the construction of the policy, as if it were adopted by express words.

(a) *Coit v. Com. Ins. Co.*, (7 Johns. 383. 390.) Vide Note XI. *Ross v. Thwait*, (1 Park, 23.) *Parr v. Anderson*, (6 East, 210.) *Speyer v. New-York Ins. Co.*, (3 Johns. 88.) *Dow v. Whetten*, (8 Wend. 160.) *Allegre v. Maryland Ins. Co.*, (6 Harr. and Johns. 408.) *Rankin v. The Amer. Ins. Co.*, (1 Hall, 619.) *Rogers v. Mech. Ins. Co.*, (1 Story, 607.)

§ 43. The law very reasonably ascribes to the insurer a knowledge, not only of the general usages of commerce, but of the course usually pursued in each particular voyage or trade that may be the subject of an insurance. It is an important branch of the knowledge, that from the nature of his profession he is bound to acquire, as essential to an intelligent discharge of its duties. If, when asked to make an insurance, he is ignorant of the usual course of the voyage or trade to which it relates, by suitable inquiry, he may gain from the applicant the information that he requires. If he omit to inquire, his ignorance is voluntary, and cannot justly be alleged to defeat the claims of the assured. When he chooses to insure without inquiry, he takes upon himself the risk of the existence of a usage, that may increase his liability; and when the usage is known to him, he must presume, that it will be followed, unless an intention to depart from it, is expressly declared. An additional risk, when he is unwilling to assume it, may be excluded from the policy; but when he consents to the policy in its ordinary form, he consents that the usage shall be its interpreter.

§ 44. The reported cases, in which the evidence of a usage of trade has extended the risks of an insurance, are exceedingly numerous, but all of them, however various in their special circumstances, rest upon the same principle, that a known usage may affect the construction of every clause and condition of the policy, to which it may reasonably and consistently be applied. I shall extract a few, from the mass of cases on the subject.

If a vessel is insured from one port to another,

the general rule of law is, that she must prosecute the voyage by a direct route, and such is the meaning attributed to the terms of the policy, so that if the vessel stop at an intermediate port, it is a deviation that discharges the insurer; but, if the touching at an intermediate port is sanctioned by the known usage of the trade to which the insurance relates, the deviation is excused, and the insurer continues liable, for the policy then receives the same interpretation as if the liberty to touch were given by express words.

If a vessel is warranted to depart with convoy, the words import, and such is their legal construction, that the vessel must be under convoy when she begins the voyage: but if it is proved to be the usage of vessels engaged in similar voyages, to sail without convoy from the port of departure and join the convoy at a different place, the usage modifies the warranty—it is then construed as a warranty to depart with convoy from the place to which the usage refers.(a)

If a vessel is insured on a distant voyage, out and home, with liberty to touch, stay and trade, at all ports and places whatsoever, this license, in its ordinary interpretation, would confine the vessel to ports or places, in the usual course of the outward or homeward voyage; but if such is the usage of the trade, it may be construed to embrace an intermediate voyage or voyages, performed by the vessel after the completion of her outward passage, and before the commencement of her return.(b)

(a) *Lethullier's Case*, (Salk. 443.) *Bond v. Gonsales*, (Ib. 445.) *Gordon v. Morley*, (2 Strange, 1264.) *Enderby v. Fletcher*, (2 Park, 646.)

(b) Note XII. *Tierney v. Etherington*, (1 Burr. 342.) *Pelly v. Roy*.

§ 45. In the preceding cases, the tendency of the usage proved, was to increase the risks of the insurer, and in all such, the observance of the usage evidently rests in the mere discretion of the assured, since the insurer, when the voyage as pursued is covered by the policy, can have no right to complain of a change in its risks, that operates solely to his own benefit; but when an existing usage, as sometimes happens, tends to diminish the risks, as they would otherwise be considered, its observance, it cannot be doubted, is obligatory upon the assured. As the insurer is bound to presume that an unfavorable usage will be followed, so he has the right to expect its observance when favorable: and as in the first case, it is fairly to be presumed, that the premium was enhanced in proportion to the risks, so it is equally to be presumed, that it was proportionally diminished in the other. Hence, as a departure from a favorable usage defeats the just expectations of the insurer, and enlarges the risks he meant to assume, its necessary effect is, to discharge him from the obligations of the policy. Where the usage increases the risks, it is proved by the assured, in order to entitle himself to the recovery of a loss, for which the insurer otherwise would not have been responsible. Where the usage is favorable, it is proved by the insurer, in order to dis-

Ex. Assur. Co. (1 Burr. 341.) *Noble v. Kennoway*, (Doug. 510.) *Hoskins v. Pickersgill*, (1 Park, 8th ed. 126.) *Salvador v. Hopkins*, (3 Burr. 1707.) *Gregory v. Christie*, (1 Park, 104. 3 Doug. 419.) *Farquharson v. Hunter*, (1 Park, 106.) *Urquhart v. Barnard*, (1 Taunt. 450.) *Constable v. Noble*, (2 Taunt. 403.) *Moxon v. Atkins*, (3 Camp. 300.) *Gracie v. Mar. Ins. Co.* (8 Cranch, 75.) *Col. Ins. Co. v. Catlett*, (12 Wheat. 386.) *Coggeshall v. Amer. Ins. Co.* (3 Wend. 283.)

charge himself from a loss, for which, by the terms of the policy, he would be liable.(a)

§ 46. It is stated by Mr. Marshall, that when British underwriters insure the ships of a foreign nation, in a foreign trade, they are not presumed to be cognisant of the particular usages of the trade to which the insurance relates, but that to render them liable, when the terms of the policy are insufficient to justify the course actually pursued, it must be proved, that the existence, of the usage relied upon, was made known to them—that is, their knowledge of the usage must be shown by direct proof, and is not to be inferred from its mere existence. Upon an attentive examination, however, of the case to which this learned writer refers, I have been unable to discover, that it lends any support whatever to the position that he has advanced; and it is certainly a reasonable doubt, whether the distinction that the position implies, is either politic or just. Its impolicy, in its tendency to repel foreigners from insuring, is manifest, nor does its injustice seem difficult to be shown. We have seen that when the underwriter is ignorant of the particular course and usages of the trade that he is desired to insure, it is his duty to ascertain the facts by inquiry from the assured, and as these means of information equally exist in all cases, it is difficult to assign a valid reason, why the duty does not in all cases equally attach, whatever may be the national character of the trade and persons insured. If, in all cases, the underwriter is bound to inquire, his voluntary ignorance should no more be allowed as a defence against the claims

(a) *Middlewood v. Blake*, (7 Term, 158.)

of the foreigner, than against those of a fellow-subject or citizen. The unsupported opinion of Mr. Marshall cannot be regarded as evidence of the law in England, and has not hitherto been adopted in any decision in the United States. The question, therefore, that he states to have been determined, is still open. (a) Perhaps the opinion of this able writer is not unreasonable, if confined to the cases where the foreign trade, to which the policy relates, has not before been the subject of insurance; and in such, it is certainly expedient that the person effecting the policy should disclose the existence of any usage increasing its risks.

§ 47. 4. There is a class of cases plainly distinguishable from all that have been stated, in which the effect of a usage is not to vary the construction of the policy, but to prevent the application of a rule of law, by which the rights of the parties would otherwise be determined, in relation to a subject on which the policy is silent. The effect of the evidence in these cases is, not to determine the words of the policy to a different sense, or to make an addition to its terms by the insertion of a usage, as a part of the contract, but to substitute, in the particular instance, a rule resulting from the usage, in place of that, which the law, not the contract of the parties, would prescribe.

§ 48. Thus the policy contains no stipulation whatever for the return of the premium, but the obligation to return it, in whole or in part, exists only when the law imposes it. It is the law that creates

(a) Marsh. 275. *Lavabre v. Wilson*, (Doug. 284.) Vide Note XIII. Vide also *Urquhart v. Bernard*, (1 Taunt. 450.) Note XII.

and defines the duty. The general rules are, that where the policy has not attached at all, the whole premium must be returned, and a proportional part, when only a portion of the risks, when divisible, has been incurred ; but, where the risks and premium are entire, if the policy has once attached, so that the underwriter, by any event, could have been made liable for a total loss, the law entitles him to retain the whole of the premium. The usage, however, of a particular trade, may create an exception from this last rule, and impose upon the underwriter the duty of returning the whole or a large portion of a premium, that the law would have permitted him to retain. It appears to be the established usage in England, that when a vessel is insured at a gross premium, at and from the island of Jamaica, or at and from a particular port in that island, if, from the breach of a warranty that she shall depart with convoy, or sail on a particular day, the risks of the voyage are not commenced, although the policy had attached on the vessel in port, the whole of the premium, with the deduction only of one half per cent., must be returned, and this usage seems to embrace the whole of the West India trade. In a case where its existence was clearly proved, it was held by Lord Mansfield, and the Court of King's Bench, that the underwriters, although not liable by the general rule of law, were rendered so by the express usage. (a)

(a) *Long v. Allen*, (1 Park, 797; Marsh. 661.) *Bloomer v. Dorr*, (*Contra* 10 Mass., p. 26.) Vide Note XIV. *Newman v. Cazalet*, (2 Park, 900; Marsh. 763.) *Vallance v. Dewar*, (1 Camp. 503.) *Kingston v. nibbe*, (1 Camp. 508, n.) Vide also Note XXII.

The policy contains no provisions relative to the liability of the insurer in cases of a general average. Its terms, indeed, imply that he is liable, but do not expressly create that liability, nor attempt to define its limits and measure. The rules, therefore, on this subject, are not derived from an interpretation of the contract, but are rules of general and positive law. It is a general principle, certainly in England, that the question both of the insurer's liability abroad and of its extent, are to be determined by the laws and usages of England, not by those of the port or place where the general average may have been adjusted and settled; but when it is clearly proved that in all cases, when the assured had been compelled to pay, upon the adjustment of a general average in a particular foreign port, a larger sum than he would have been liable for by the standard of the English law, it had been the usage of the underwriter to make good his loss in its whole extent, the foreign adjustment is held to be valid and conclusive; that is, the usage controls and supersedes the general rule of law.^(a)

§ 49. There are other cases, in which a usage, not dependent upon the consent of the insurers, as manifested in the settlement of losses, but strictly a usage of trade, seems, at first view, to have the same effect in superseding a rule of law; but it will appear, upon examination, that in these cases, the

(a) *Newman v. Cazalet*, (2 Park, 900.) *Power v. Whitmore*, (4 M. & S. 141.)—The rule, however, is subject to this modification, that when a foreign port is the vessel's first port of discharge on the voyage, on which the average has been incurred, it is the proper place for settling the average, and the law of the place, in all cases, governs the adjustment.—*Simonds v. White*, (2 B. & C. 305.)

effect of the usage is rather to excuse a compliance with the rule of law, than to supersede it, by the substitution of an opposite or different rule; so that the cases they properly resemble, are those in which the usage is applied to excuse a deviation.

Where a ship or goods are insured at and from one port to another, the policy contains no designation of the period when the risks are to commence, and its words would apply to any future voyage, answering the description, however distant, in time. The law, however, determines that the voyage described shall be the first voyage thereafter commenced, and the goods, the first laden, so that if the vessel sail upon a different voyage, or with a different cargo, the underwriters are discharged. This rule may be modified in its application, by the usage of a particular trade.

When a vessel, or her cargo, is insured at and from Newfoundland to a port in Europe, if, when the vessel arrives at Newfoundland, there is no cargo prepared for her, by the usage of the trade, she may be employed until her cargo is ready, in catching fish upon the banks, or in making an intermediate voyage to an adjacent port, in the British colonies; and when this usage is proved, the policy is not defeated by the delay, or the intermediate voyage, but its risks are suspended and prevented from attaching, until the vessel begins to take in her cargo upon the voyage insured. It is to this period, that the words "at and from," are then considered to refer. The particular usage supersedes and modifies the application of the general rule.(a)

(a) Vallance v. Dewar, (1 Camp. 503.) Ougier v. Jennings, (ib. note, p. 505.) Vide Note XIV.

§ 50. I apprehend, that, as a general rule, a usage of trade to be binding on the parties, must be a usage in the course and prosecution of the voyage insured, or in the ports or places to which the vessel by the terms of the policy is destined, or authorized to proceed. Where the usage sought to be applied, whether to vary the construction of the policy, or change the application of a rule of law, has been followed in a port, to which the vessel resorted from necessity, in many cases, there will be no ground for the presumption that it was even known to the parties, and, in none, for the supposition that their contract was made in reference to its existence, since they could not have meant to provide for an event that they never expected would happen. The voluntary observance of such a usage may operate to discharge the insurer, but can never create a responsibility that would not otherwise exist. But where the observance of the usage is a necessary result from the peculiar circumstances in which the vessel is placed, the insurer doubtless continues liable. A resulting loss would then be attributed, not to an unauthorized act, but to a necessity created by the perils insured against.

§ 51. It is also probable, that in the construction of a time policy, a different rule would be adopted. The consent of the underwriters to an insurance in this form, might be justly interpreted, as a consent, to assume the risk of every valid usage, that in any voyage, in which the vessel might engage, or in any port or place she might chance to visit, might become applicable to any provision of the policy, or operate to supersede a rule of law that otherwise would control its interpretation. The assured, under such a

policy, has an absolute and unrestricted right to employ the vessel in any voyage or trade he may deem proper ; but in many cases a particular voyage or trade can only be prosecuted, in the mode prescribed and sanctioned by an existing usage. Hence, the denial of the right of the assured, in such cases, to follow the usage, would be in effect a denial of his right, to engage in the voyage, or trade at all. It would thus create a restriction, neither imposed by the terms, nor fairly to be inferred from the nature of the insurance. Indeed, upon an opposite construction, there are no circumstances under which the assured in a time policy could protect himself by any usage, however well known and reasonable, not expressly adopted, or referred to, in the policy. Such an insurance is not made in reference to any particular voyage or trade, and, consequently, not in reference to any particular usage. The policy, *therefore, embraces all or none.*(a)

(a) Vide *Coggeshall v. The American Ins. Co.* (3 Wend. 283.) Note XII. Note XV. *Milward v. Hibbert*, (3 Ad. & Ell. N. S. 120.)

PROOFS AND ILLUSTRATIONS.

NOTE I.

P. 161, § 3. The following is the passage in Paley to which the text refers :

“ Where the terms of the promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended, at the time, the promisee received it.”

“ It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise ; because, at that rate, you might excite expectation, which you never meant, nor would be obliged, to satisfy. Much less is it the sense, in which the promisee actually received the promise ; for, according to that rule, you might be drawn into engagements which you never designed to undertake. It must therefore be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted his promise.”

“ This will not differ from the actual intention of the promiser, where the promise is given without collusion or reserve ; but we put the rule in the above form, to exclude evasion in cases in which the popular meaning of a phrase and the strict grammatical signification of the words differ ; or, in general, wherever the promiser attempts to make his escape through some ambiguity in the expressions which he used.”

“ Temures promised the garrison of Sebastia, that, if they would surrender, *no blood should be shed*. The garrison surrendered ; and Temures buried them all alive. Now Te-

mures fulfilled the promise in one sense, and in the sense too in which he intended it at the time ; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it : which last sense, according to our rule, was the sense in which he was in conscience bound to have performed it." (*Paley's Mor. and Pol. Philosophy*, 104.)

In a recent case in the Supreme Court of New-York, Mr. J. Bronson adopted the rule of Paley, and applied it with great propriety and entire success.

Potter v. The Ontario and Livingston Mut. Ins. Co. (5 Hill, 147.) The action was on an insurance against fire. The policy contained this clause, "In case the assured or the assigns of the assured, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same endorsed on this instrument, *or otherwise acknowledged and approved by them in writing*, then this policy to cease and be of no effect." The plaintiff did effect a further insurance on the same property, and gave immediate notice thereof to the secretary of the company, and on the day following the secretary, by letter, acknowledged the receipt of the notice. The further insurance was not, however, endorsed on the policy, nor did the letter of the secretary, in express terms, signify the approval of the company. The question, therefore, was, whether the condition in the policy had been fulfilled. On this question Mr. J. Bronson, in delivering the opinion of the court, remarked as follows :—

"The plaintiff gave notice in due time of the further insurance, and the same was acknowledged by the defendants in writing. But the notice of further insurance was to be "*acknowledged and approved*" by the company, and it is said that there was no approval. That may be true, if we look only at the literal reading of the answer which the defendants gave to the notice. But I take the rule to be, that a writing contains all that may fairly be implied from it, and it is difficult to read the answer without inferring that the defendants meant to *approve*, as well as acknowledge the notice of a further insurance. What else could the defendants have intended? They say to the plaintiff, "We

have received your notice of additional insurance," and there they stop. There was no disapproval, nor was there any suggestion that the matter was reserved for future consideration. The plaintiff could not but understand from the answer that the notice—or the further insurance, if such be the true reading of the clause—was "acknowledged and approved," and that nothing further remained to be done. Let us apply Dr. Paley's rule in relation to the performance of contracts. He says: "Where the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time the promisee received it." Now, how did the defendants apprehend at the time that the plaintiff would receive their answer? If they secretly reserved the right of approval or disapproval at a future period, could they have believed that their written answer would be so received by the plaintiff? I think not. They must have intended the plaintiff should understand from the answer that every thing had been done which was necessary to a continuance of the policy, and consequently that they approved, as well as acknowledged, the further insurance."

The truth of Dr. Paley's rule is evidently implied in the maxims, "*Verba fortius accipiuntur contra proferentem*," and "*Pactionem obscuram iis nocere, quorum fuit in potestate rem apertius dicere*." Since the words of a promise must always be considered as those of the promiser, and as it was in his power to render them clear and explicit, the necessary result of these maxims is to secure that interpretation of an equivocal promise which is most favorable to the person receiving it—and the observations of Paley show that this interpretation was probably intended by the parties.

When the terms of a promise are dictated by the person receiving it, it might seem that the rule of Paley ought not to be applied; but that the words, as the language of the promisee, should be construed, strictly, against him, and, favorably, to the promiser. Vattel (sec. 2, c. 17, § 267) adverts to the distinction, and it seems to be in reference to it that Mr. Marshall observes, "that in construing the occasional

clauses of a policy, it would not be improper to inquire by whom they were introduced," meaning, as his subsequent remarks evince, that the clauses should be construed most strongly against the party introducing them ;(a) but the proposed inquiry, besides its practical difficulty, would, in many cases, probably lead to false results, if the party at whose instance, and for whose benefit, a new clause is introduced into the policy, is to be considered its author, and the words as his language.

Thus, when the object of the new clause is to *enlarge* the risks of the insurer, it is plainly introduced at the request and for the benefit of the assured ; but its strict construction against him would be more likely to defeat than promote the intentions of the parties, and would violate the rule that the promised indemnity is always to be liberally construed. The only safe rules are, that the words of a promise, with its exceptions and qualifications, shall, in all cases, be considered as those of the promiser, and those of a representation or condition on which the promise is founded, as the language of the opposite party. These are the rules that in the construction of the policy have been practically followed, and with these the conclusion of Vattel that it makes no difference in the just interpretation of a promise, whether its terms be original or adopted, entirely corresponds.

In applying the rule of a liberal construction in favor of a grantee or promisee, the caution of Lord Bacon ought never to be forgotten, that "it is a rule not to be resorted to nor to be relied on, but when all other rules of exposition fail." It is not to be followed, when the intention of the parties that the words shall be understood in a more restricted sense, is otherwise apparent, or may be otherwise collected. Hence the effects and consequences of the interpretation, and its consistency with the main design of the parties, and the other provisions of the instrument, are first to be considered. The maxims, "*verba generalia restringuntur ad habilitatem personæ vel ad aptitudinem rei.*" "*Quotiens idem sermo duas sententias exprimit ea potissimum accipiat quæ rei*

(a) 1 Marsh. 305.

gerendæ aptior est."(a) "*In obscuris id quod minimum est, sequimur.*" "*Verba ita sunt intelligenda, ut res magis valeat,*" &c. "*Ex antecedentibus et consequentibus optima fit interpretatio,*" are all prior in the order of their application to "*verba fortius accipiuntur,*" &c.

There is no greater desideratum in the English law than a treatise at once philosophic and practical, on the rules of interpretation as applicable and applied to laws, deeds, wills and contracts. The reader who is desirous to enlarge his views on the subject, and to ascertain how far the received maxims of our law correspond with those that men of the most enlightened minds have drawn from the depths of reason and experience, should consult and study Grotius de Jure, B. & B. lib. 2, and Vattel, lib. 2, c. 17; and above all, that admirable commentary on Grotius, which is contained in the chapter "*Of Interpretation*" in the 2d vol. of Rutherford's Institutes of Natural Law. The Legal and Political Hermeneutics of Dr. Leiber, chap. 1, § 8, and chap. 3, § 2, 3; and a little book of Ernesti, on the "*Elements of Interpretation,*" translated by Dr. Stuart, of Andover, may also be consulted with advantage.(b)

NOTE II.

P. 161, § 5. In *Tierney v. Etherington*, quoted and adopted by Lord Mansfield, in *Pelly v. Roy. Ex. Ass. Co.* (1 *Burrow*, 341,) Lord C. J. Lee said, "It is certain, that, in construction of policies, the *strictum jus* or *apex juris* is not to be laid hold on, but they are to be construed largely,

(a) Dig. lib. 50; tit. 17. Lex. 67.

(b) Vide also 2 Kent's Com., (5th ed., p. 552. 559,) and two able essays on "the construction of contracts," in the July and October numbers, 1840, of the *American Jurist*. Chancellor Kent adopts the rule of Paley in these words, "the true principle of sound ethics is, to give the contract the sense in which the person making the promise, believed the other party to have accepted it."

for the benefit of trade, and *for the insured.*" The rule of liberal construction thus laid down has since been invariably followed, and is more or less distinctly admitted in all the decisions. Whether it has not, in some cases, been carried too far, so as to substitute a presumed intent for that expressed by the words of the policy, may perhaps be reasonably doubted.

The words of C. J. Jones, in *Dow v. Whetten*, (1 *Half's Superior Court Rep.* 274,) in referring the principle of a favorable construction to the nature of the contract, correspond with the statement of the text, "The policy is a contract of indemnity, and such construction is to be given to the words employed in it as will make the protection it affords co-extensive, if possible, with the risks of the assured during the voyage for which the premium is paid."

Blackett v. Royal Ex. Assur. Co., (2 *Crompt. & Jarvis*, 244.) The policy was on a ship, and contained this memorandum: "Free from average under £3 per cent., and the question upon the construction was, whether the underwriters were only to be liable when each particular loss exceeded £3 per cent., or whether successive losses could be added together, so as to render them liable, when the aggregate exceeded that sum. Upon this question Lord Lyndhurst, C. B., in delivering the opinion of the court, said, "The memorandum is in the nature of an exception. The policy is general, extending to all losses. The memorandum excepts losses when each or all, according to the construction to be put upon it, are under £3 per cent. The rule of construction, as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are intended. The words in which they are expressed, are considered as his words, and if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer. The words here used are ambiguous, capable of including every average which *per se* is under 3 per cent., or capable of including every average, however minute, if the aggregate of different averages comes up to that amount. Usage might, perhaps, explain the ambiguity, and show which of the two alternatives was intended, but there was no evidence of usage. In the absence, therefore, of usage and au-

thority, it seems to us that we ought to rest upon the rule of construction we have mentioned, and according to that rule the defendants are responsible if the aggregate of different averages comes up to £3 per cent."

Palmer v. Warren Ins. Co. (1 Story, 360.) The insurance was on a time policy on half of a vessel for one year, and contained this clause, "excluding, during the term, all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th." The vessel was lost on a voyage, commenced before the 15th of October, from a port in the West Indies to New-York.^(a) The liability of the insurers depended on the construction of the clause of exception. If construed as embracing *voyages*, from or to any port in the West Indies, within the excepted period, the insurers were exonerated, but were liable if the exception was confined to losses happening *in port*. The observations of Mr. J. Story, upon this really difficult question, as an admirable specimen of exegetical inquiry, merit the attentive perusal of the student, but they cannot be abridged without injury to the argument, and are too long for insertion; I must be satisfied with stating their result. The learned judge held that the clause in controversy ought to be construed as an exception of risks, and not of voyages, and should therefore be read as if written thus: "Excepting all risks in all ports and places in Mexico and Texas, also in the West Indies, from July 15th to October 15th, each inclusive." That, after some hesitation, he rested in the conclusion that this was the true, the natural, and the easiest interpretation of the clause, and would satisfy the intention of the parties so far as it could be gathered from the words or apparent objects of the policy. He further held that, supposing the meaning of the excepting clause to be ambiguous, the construction would then be governed by the rule that an exception in a policy is to be construed most strictly against the underwriters, and most favorably to the insured.

(a) It is stated in the case that the vessel sailed on the 25th October, but apparently this is an error. Had the vessel commenced her voyage after the period limited in the exception, there would seem to have been no ground for a defence, whichever construction was given to the clause.

The same rule had been recognised by Mr. J. Story, in *Donnell v. Col. Ins. Co.* (2 Sumn. 381,) although he there speaks of it as "a mere technical rule of construction," from which it might be inferred, that in his judgment, it had no regard to the probable intent of the parties. These expressions must doubtless be regarded as *obiter*, not as evidence of a deliberate opinion. Vide also *Earl of Cardigan v. Armitage*, (2 B. & C. 197,) and *Buller v. Denning*, (5 B. & C. 842.)

In both the preceding cases, Mr. J. Story speaks of an exception, as introduced *for the benefit of the insurers*, and a careless reader might infer that, it was upon this ground that he held, that as against them, it was to be strictly construed; a more attentive examination will show, that the true ground of the decision was, that the words of an exception are the words of the insurer, and therefore subject to the rule "*verba fortius accipiuntur contra proferentem*." If the words of a clause, are to be construed strictly against the party for whose benefit it is introduced, the main provisions of the policy must be construed strictly against the assured, and as a necessary consequence, the favorable interpretation that is now adopted would be displaced, and his indemnity be reduced to its narrowest possible limits.

Yeaton v. Fry, (5 Cranch, 335.) The policy was on a vessel at and from Tobago, to one or more ports in the West Indies, and at and from thence to Norfolk, against all risks, 'blockaded ports and Hispaniola excepted.' The vessel sailed from Tobago to a blockaded port, but without a knowledge of the blockade, was turned away, and on her voyage to Norfolk, was captured by a French privateer. The question was, whether the loss was excluded from the policy by the exception. The court very properly held, that the words "all blockaded ports, &c." could not be construed as a warranty on the part of the assured, but were the *words of the insurers*, and to be construed as an exception from the general risks of the policy, and that the risks of blockaded ports looking to the object of the exception, did not necessarily include the risk of a voyage to such a port, but merely the risk incurred by breaking the blockade as defined by

public law ; and as the vessel sailed from Tabago without a knowledge of the blockade, this risk had not been incurred. The insurers were therefore liable.

NOTE III.

P. 163, § 7. "*Ubi nulla est conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu.*" (*Grotius De Jur. B. & P. lib. 2. c. 16.*) The term "*conjectura*," is constantly used by Grotius as denoting the collection of the intent, by other means than the sole explanation of the words. That is, it denotes "construction" as distinguished from mere interpretation. Hence, his meaning is, that words are to be understood in their ordinary and popular sense, unless the intent to use them in a different sense is otherwise manifest.

The remarks of Mr. J. Story, in *Palmer v. Warren Ins. Co.*,^(a) may also be adduced in support of the text. "Policies of insurance are usually drawn up in loose unartificial language, and indeed, in the language of common life, and therefore, are always construed liberally ; and rarely, if it is possible, subjected to any nice or narrow, or critical strictness, or any technical interpretation. We look rather to the intent, than to any grammatical accuracy in the use of language."

The observations of Lord Ellenborough, in *Robertson v. French*, (*East*, 135,) are a brief, but lucid summary of some of the leading rules of interpretation ; and their substance, the reader will perceive, has been incorporated into the text. Their importance, however, renders it proper that they should be exactly transcribed.

"In the course of the argument," (his Lordship said,) "it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases : it is therefore proper to state upon

(a) 1 Story, 365.

this head, that the same rule of construction which applies to all other instruments, applies equally to this instrument of a policy of insurance, viz. : that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance, and other instruments in this respect, is, that the greater part of the printed language of them being invariable and uniform, has acquired from use and practice, a known and definite meaning, and that the words superadded in writing, (subject, indeed, always to be governed in point of construction, by the language and terms with which they are accompanied,) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them, than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves, for the expression of their meaning, and the printed words are a general formula adapted equally to their case, and that of all other contracting parties, upon similar occasions and subjects."

NOTE IV.

P. 163, § 8. "So it is a rule, words are to be understood so that they work somewhat, and not be idle and frivolous." "*Verba aliquid operari debent; verba cum effectu sunt accipienda,*" (*Bacon Max. Reg.* 3.) Rutherford, (vol. 2, 312,) furnishes an admirable illustration of this rule, in its application to a supposed bequest. A testator devises all his plate, with the exception of 1000 ounces to his eldest son,

and directs him within a certain time after his decease to deliver the 1000 ounces to his younger son, of such sort, and in such pieces *as he pleases*." The words "as he pleases" may be referred to either son ; but apply them to the elder, and they are useless, since without them he would have all the discretion they purport to give, but apply them to the younger, and they are rendered effectual, by conferring on him a valuable privilege, that otherwise he could not have claimed.

NOTE V.

P. 64, § 8. The following case will illustrate the rule stated in the text, that a construction tending to enlarge or diminish unreasonably the risks of the policy, so as to furnish evidence that it could not have been contemplated by the parties, may be rejected, although the terms used, in their literal and usual acceptation, would fully support it. *Eyre v. Mar. Ins. Co.*, (6 *Whar.* 249.) The policy which was on a vessel, for and during the term of 12 months, contained this clause "if at sea at the expiration of 12 months, the risk to continue at the same rate of premium, until her arrival at her port of destination in the United States." The vessel was at sea when the policy expired, but not on a voyage to the United States, but to a port in the British channel ; and hence the underwriters insisted that they were not liable for a subsequent loss. Rogers, J., in delivering the opinion of the court, said—"The construction put upon the contract by the underwriters is, that although the vessel was at sea on the 10th of November, 1838, yet as she was not then destined to a port in the United States, the risks terminated on that day. The assured, on the contrary, insist that the underwriters continued to be bound, until the safe arrival of the vessel in the United States. The difference in the construction is a very marked and wide one. If we adopt the latter construction, the policy is an insurance for an indefinite time, which may continue at the will and pleasure of the assured, during the life time of the vessel.

As it terminates only on the safe arrival of the vessel in the United States, if the owners think proper to prevent her arrival, the risk must continue." The court very properly regarded this construction as unreasonable, and held that the special clause was intended only to provide for the contingency of the vessel being at sea, on her voyage home, when the policy expired, and was designed to protect her until her arrival on that voyage. In the case next to be cited, a construction was rejected as unreasonable, although such, as the words used, necessarily imported, because it would have deprived the assured, in a great measure, of the indemnity on which he must have relied in effecting the insurance. In *Grant v. Delacour*, cited by Mansfield, C. J., in *Grant v. Paxton*, (1 Taunt. 474,) "the policy was 'at and from London, to all parts and places on this side, and on the other side of the Cape of Good Hope, forwards and backwards at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station of discharge, at Blackwall or Deptford, upon any kind of goods in the Brunswick, beginning the adventure upon the said goods from the loading thereof, on board the said ship at London, and so shall continue,'" &c. The court held that these words, though literally applying only to the goods laden in London, must be intended to apply to any goods brought back to London, though they were not the same goods. As goods are taken out for the purpose of exchange and sale, and not to be brought home again in specie, a construction that would have confined the insurance in this case, to the same goods originally laden, would have been absurd, and was therefore, most properly rejected.

Delonguemere v. The N. Y. F. Ins. Co. (10 Johns. 120.) The insurance, which was on a ship, was expressed to be "at and from New-York to the port of Sisal, in the province of Yucatan, with liberty to proceed to one other port in said province." In the proper sense of the term, there are no ports whatever on the coast of Yucatan, and upon this construction, the liberty given by the policy to proceed to another port was nugatory; the court therefore very justly decided that the word "port," as used in the policy, must be taken in reference to the subject matter, and though generally meaning a harbor, yet when applied to Sisal and other

trading places on the coast of Yucatan, it meant only a road or anchorage place where cargoes were usually loaded or unloaded. Upon this construction, the underwriters were liable for the loss that had occurred. Vide also *Ogden v. Col. Ins. Co.* (10 Johns. 273.) *Gairdner v. Senhouse*, (3 Taunt. 16.)

NOTE VI.

P. 165, § 10. The grave words of Lord Coke relative to the proper construction of statutes are quite as applicable, *mutatis mutandis*, to the interpretation of contracts. "The good expositor makes every sentence have its operation, he gives effect to every word in the statute, he does not construe it so that any word should be vain and superfluous; nor yet makes exposition against express words for 'vipera est expositio quæ corrodit viscera textus,' but so expounds it that one part of the act may agree with another, and all may stand together." (11 Rep. 34.)

NOTE VII.

P. 175, § 25. In the case of *Sleight v. Hartshorne and others*, (2 Johns. 531,) in which the controversy turned on the meaning of the words "sea letter," the propriety of receiving parol evidence for the explanation of words purely technical, is distinctly admitted by the Chancellor. He says, "If the terms in question (sea letter) were of novel invention, unknown to our laws, introduced into limited use, by any of the variety of circumstances by which, in the progress of the arts and the ever changing pursuits of mankind, they are daily devised among artists, or others, in whose peculiar branch of business they are used, there could be no rational objection to admit the evidence of persons, conversant with their import and meaning, to explain them." (a)

(a) 1 Johns. 541.

In the same case Clinton, Senator, whose able opinion controlled the judgment of the court, having shown that the true meaning of the term "sea-letter," had been determined by certain acts of congress, proceeds to remark, "If, however, there was any doubt on the subject, parol testimony ought to have been admitted to explain it. In this case, stating the controversy in the most favorable light for the defendants, there were two instruments, the one legalized by treaty, the other by statute, of the same denomination; two distinct ideas were attached to the same term. This, therefore, is as much a latent ambiguity as the case commonly cited, of two individuals bearing the same name." It is, however, plain, that the analogy relied on by the learned senator does not exist. When the same word has two distinct meanings fixed by law or usage, in either of which, for aught that appears on the face of the instrument, it may have been used by the parties, the ambiguity is apparent; but the ambiguity that arises from two individuals bearing the same name, is only disclosed by evidence of the fact. The supposed case is to be referred to the head of indeterminate words, which, it has been shown in the text, are an exception to the general rule, that a patent ambiguity cannot be explained by extrinsic proof.(a)

The recent case of *The Attorney General v. Shore*, (11 Simon, 592,) contains a most able and thorough investigation of the rules, relative to the admission of parol evidence for the explanation of a written instrument, and the opinion of Parke, B., as a summary of those rules, is particularly lucid and valuable. I transcribe it, as giving the support of the highest authority to the doctrines of the text.

"I apprehend, that there are two descriptions of evidence, which are clearly admissible in every case, for the purpose of enabling a court to construe any written instrument, and to apply it practically. In the first place, there is no doubt, that not only where the language of the instrument is such

(a) On the general question of the admissibility of parol evidence to explain a patent ambiguity, I add to the references before given, the case of *Fish v. Hubbard's Administrators*, (21 Wend. 652.) The opinion of the court delivered by Cowen, J., contains a learned and able review of the English decisions, and in its conclusions, coincides entirely with the doctrine of the text.

as the court does not understand, is it competent to receive evidence of the proper meaning of that language, as, when it is written in a foreign tongue; but it is also competent, when technical words or peculiar terms, or, indeed, any expressions are used, which at the time the instrument was written, had acquired any appropriate meaning, either generally or by local usage, or amongst particular classes. This description of evidence is admissible, in order to enable the court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz: every *material* fact, that will enable the court to identify the person or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the words of the instrument, as near as may be, in the situation of the parties to it. From the context of the instrument and from these two descriptions of evidence, with such circumstances, as by law, the court without evidence may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the court being, to declare the meaning of what is written in the instrument, not of what was intended to have been written."

NOTE VIII.

P. 181, § 33. The case to which the text refers, is that of *Astor v. The Union Ins. Co.*, (7 Cowen, 202,) where the question was, whether the word "skins," in its commercial sense, embraces fur skins, or is limited to skins valuable only for leather; this limited construction being that on which the plaintiff relied. It appears from the report, that of the seven witnesses examined on the part of the plaintiff, one only was an importing merchant, and his testimony was rather in favor of the defend-

ants than otherwise. The rest were retail dealers or traders. The objection to the evidence was taken at *Nisi Prius*, and was repeated on the argument for a new trial, but its force, perhaps from the imperfect manner in which it was stated by the counsel, seems to have been greatly misapprehended by the court, as their reply is directed to an objection widely different, and which the counsel could never have intended to urge. The court say, "It was contended that the offer, and the evidence which followed, were too narrow ; being confined to the particular trade in fur or fur skins ; whereas the usage should be of trade generally. No case was cited, nor do we think the argument warranted upon principle. The phrase 'usage of trade,' implies a restriction to that class of merchants who deal in the article. Beyond that circle there can be no usage, such as was sought to be established. To sustain the objection would, therefore, be at once to overrule all the cases which allow a usage to be proved at all." Certainly the counsel for the defendant never meant to say, that any other merchants should be called to prove the usage, than those who, as importers of skins, were acquainted with its existence. Their objection was, that none such were called. As the point of the objection was therefore misconceived, the decision can hardly be regarded as an authority even in New-York, in favor of the position that the usage of a trade, wholly domestic and internal, can be allowed to govern the construction of a marine policy.

NOTE IX.

P. 182, § 34. The distinction between a usage and the mere opinions of witnesses, is very clearly stated by Lord Mansfield, in *Syers v. Bridge*, (*Doug.* 569. 1 *Park*, (*Hillyard*,) 133.) The policy contained a clause giving the vessel a liberty to cruise six weeks, and upon the proper construction of this clause the case turned. Some of the witnesses examined, thought that the liberty of cruising meant for six successive weeks ; others, that the vessel might cruise at different times, and if the separate times added together did not exceed six weeks, she would be protected by the policy. Upon the argument of a rule for a new trial, Lord

Mansfield said, "This was merely a question of construction, upon the face of the policy, and, unless a usage could have been shown in favor of this desultory cruising, calling witnesses to support it, was calling them to swear to mere opinion. None of those produced *knew of any instance*, and therefore, *their evidence ought not to have been received*." By "an instance" his lordship evidently meant a case in which such a construction had been given to the policy.

In the case of *Crofts v. Marshall*, (7 Ca. & Payne, 597,) a merchant and underwriter was called as a witness, and was asked whether, in his judgment, having heard the evidence, the loss that had occurred was a loss by perils of the sea within the meaning of the policy. The question was objected to, and Lord Denman, C. J., said, "I am of opinion, that the question ought not to be put. I think you cannot ask a witness his opinion, derived only from the opinions of other persons as to the meaning of an instrument which is not ambiguous in its terms, and which has no abstruse words which require explanation."

So in *Winthrop v. Union Ins. Co.* (2 Wash. C. C. R., 16.) Mr. J. Washington said, "Usage can only be resorted to when the law is doubtful and unsettled, and even then the construction must be determined by the *usage*, and not by the *opinions* of witnesses, however respectable they may be." The only proper distinction between a usage relating to the meaning of words, and the opinions of witnesses, is, that the first must be proved by facts, i. e. instances of its observance. In saying that a usage is only to be admitted when the law is doubtful and unsettled, this able judge could only have meant that it is not to be received when contrary to some positive law, or the express words of the policy; not that it may not be received to vary a construction that the law would otherwise certainly adopt. That such was his meaning is evident from his subsequent remarks that the usage offered to be proved, neither contradicted the terms of the policy, nor any settled principles of law.

In the case of *Rogers v. The Mech. Ins. Co.*, (1 Story,

607,) Mr. J. Story expresses himself with pointed energy. Many of the witnesses had sworn positively as to their own understanding of the proper construction of the policy, but had cited no instances to show that this interpretation had been followed in practice. Upon this testimony, the learned judge remarks, "This court has nothing to do with the private opinions of witnesses, however respectable, which respect the proper interpretation of contracts. That is matter of law, which the court itself is bound to expound in the absence of any usage or custom, which impresses upon the words a peculiar and technical meaning." This case, which is of leading importance, as evincing the necessity of subjecting the evidence of usage to stricter rules than have sometimes been followed, will be fully stated in a subsequent note. (Note XI.)

NOTE X.

P. 185, § 36. *Scott v. Bourdillon*, (5 Bos. & Pul. 2. N. R. 213.) This case is so loosely reported, that it does not distinctly appear, whether the evidence of a usage related to the general mercantile sense of the word "corn," as not including "rice," or to its practical interpretation in the memorandum of the policy; nor, indeed, whether the judgment of the court was founded upon the usage, or its own interpretation of the meaning of the word. C. J. Mansfield says, "no person reading the memorandum would be apprised that rice was intended to be exempted by it from partial loss." The court must, therefore, have thought it was not included in the common and ordinary sense of the word corn, yet corn, in its general sense, as embracing all cerealia, certainly includes rice, and its popular sense, I had supposed, agreed with its scientific. The cases of *Uhde v. Walters*, (3 Camp. 16,) and of *Robertson v. Clark*, (Ry. & Mo. 75,) are sufficiently stated in the text.

Astor v. Union Ins. Co., (7 Cow. 202.) The insurance was upon "furs," and the assured claimed a partial loss upon a quantity of "fur skins," which were damaged during the voyage. It was not denied that "fur skins," may be pro-

perly described as "furs," so that had the loss been total, the insurer would have been liable, but it was denied that they were liable for a partial loss, upon the ground, that fur skins were plainly comprehended in the general meaning of the word "skins," as used in the memorandum of the policy. To repel the defence, the plaintiff offered to prove by parol, that by the *understanding* of the trade in *the city of New-York*, furs are not *considered* to be within the meaning of the words "skins and hides," in the memorandum; skins being those where the skin constitutes the chief value; and furs, those where the value is constituted by the fur. The evidence, although objected to, was admitted by the judge on the trial, and the plaintiff obtained a verdict, which the Supreme Court of New-York, upon argument, refused to set aside. I do not refer to this case, as an authority (except as having probably fixed the meaning of the word, "skins," in the memorandum of the New-York policies,) but as exemplifying in their most aggravated form, nearly all the mistakes that it seems possible to commit in receiving evidence to vary by a usage the plain import of words, and in determining the value and effect of the evidence given. First—The usage sought to be proved was not a general usage of foreign commerce, but the usage of a particular trade in the city of New-York, and the witnesses were not merchants, but domestic traders and manufacturers. Second—The witnesses swore to their understanding and belief, and furnished no instances of the practical use and interpretation of the word in other mercantile contracts. Third—The plaintiff's witnesses contradicted each other, and each witness contradicted himself, that is, made admissions that destroyed the inference his testimony was meant to establish. Fourth—Not a single instance was proved or alleged to have occurred of the settlement of a loss, under the policy, in which the construction of the plaintiff's had been followed, and it seemed a necessary inference from the testimony of the defendant's witnesses, that the practical interpretation of the memorandum had always been different. An attentive examination of the report of the case, will verify the truth of these observations; much of the loose practice that has prevailed in New-York, and in other states,

is doubtless to be attributed to the influence of this unfortunate decision. Its true use and value will be found, by considering it not as a guide, but as a beacon.

NOTE XI.

P. 193, § 40. *Mason v. Skurray*, (1 *Marsh.* 226. 1 *Park*, 253.) The facts of the case, and the substance of the decision are sufficiently stated in the text. It is proper, however, to add a frequent and often quoted observation of Lord Mansfield. In his address to the jury, Lord Mansfield, (*inter alia*,) said:—"The question is, whether the usage has not explained the generality of the words. If it has, *every man who contracts under a usage, does it as if the point of usage were inserted in the contract in terms.*"

Brough v. Whitmore, (4 *Term*, 206—216.) In this case, there was no evidence of the usage on the trial, but the counsel for the assured having been directed by the court to inquire into the facts, on a subsequent day stated, as the result of their inquiries, that provisions which were necessary for the use of the ship's crew, were always comprehended under the word "furniture," and that underwriters had frequently *paid the loss upon such policies*. This statement seems not to have been denied by the opposite counsel, and was plainly considered by the court as establishing the facts it embraced.

Syers v. Bridge, (*Doug.* 529,) and *Coit v. Com. Ins. Co.* (7 *Johns.* 383—390,) are sufficiently stated in the text. Upon this last case, Mr. Phillips observes, that "it seems to go very far towards allowing the parties to show that their contract is different from what it evidently appears to be on the face of it," (*Phil.* 44, *note a.*) The propriety of the observation is not perceived. The case goes no further than to show, that the meaning of a general term *may be restricted* by usage, in which it perfectly agrees with other decisions. It is true, the evidence not only tended to show, but did show, that the contract of the parties was different from what it appeared to be on its face; and such is the result in every case where a usage is permitted to vary the construction that the court would otherwise be compelled to adopt.

Ross v. Thwaite, (1 *Park*, 23.) The insurance was upon goods generally, and the loss proved was upon goods lashed upon deck, the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker, that none of these are within a general policy on goods; but that when meant to be covered, they are always insured by name, and at a higher premium. A policy on goods generally meant only such as were merchantable, and a part of the cargo. Lord Mansfield said he understood the usage to be so, and thought it consistent with reason, and upon his suggestion the plaintiff abandoned his claim. The evidence in this case seems to have been rather slight, but it was uncontradicted, and the usage in question, which is ancient and universal, must have been perfectly notorious. It appears, however, by subsequent decisions, that when goods of a particular description, such as vitriol and timber, are stowed or lashed on deck, that if it clearly appear that such is the usual mode of carrying them, the underwriters will be responsible for a loss; that is, the particular usage will supersede the general. *Da Costa v. Edmonds*, (4 *Camp*. 142.) *Gould v. Oliver*, (2 *Scott*, 252.) *Same v. Same*, (5 *Scott*, 445; 4 *Bing. N. Ca.* 134.)

Parr v. Anderson, (6 *East*, 202. 208.) The policy was on a ship, "with or without letter of marque," and the question was whether the permission to carry letters of marque enabled the vessel to cruise, leaving the course of the voyage, for the purpose of hostile attack and capture; or whether it was limited to the use of force for the mere purpose of defence. No evidence was given on the trial as to the practical interpretation of the disputed clause, and the defendant, under the direction of the judge, obtained a verdict. The Court of King's Bench, however, granted a new trial, principally for the reasons stated in the following extract from the opinion of Lord Ellenborough: "Under such circumstances of novelty in point of question, as far as respects any judicial determination upon the effect of these words, and considering the difficulties which attend the construction of them, either in their most extended or limited sense, it may be material to ascertain, as a question of fact, in what manner the parties to contracts containing this form of words have acted upon them in former instances, by paying losses where devia-

tions have happened, and whether they have as yet obtained *in use and practice*, as between assured and assurers, any and what definite import; we think it fit that for these purposes, this case should undergo a second trial."

Speyer v. N. Y. Ins. Co. (3 Johns. 88.) The policy had the following clause at the foot in writing—"warranted not to abandon, if turned away, nor if captured, until condemned." It was proved on the trial, (the question as to the competency of the proof being reserved,) that the words "turned away," as understood by assurers and assured generally, and by the parties at the time, meant a restraint or hinderance of the vessel, from proceeding to her port of destination by a blockading force, and was not understood to apply to the restraints or acts of the government, at the port of destination.

It does not appear from this statement, that the proof given, established any use or practice whatever, between the assurers and the assured, but merely their common and general understanding. It was, therefore, evidence of opinion, not of usage: but upon the argument of a motion for a new trial, the question as to the competency of the proof, was neither agitated by the counsel nor considered by the court; the counsel for the underwriters admitting that the words "turned away," in their proper sense, were limited to the turning away from a blockaded port. The case, therefore, although it has sometimes been quoted as such,^(a) is no authority to show, that the evidence given on the trial, was properly received.

Dow v. Whetten, (*in error*, 8 Wend. 160.) The insurance was upon merchandise, shipped at New-York for Batavia, and other ports in the island of Java, and upon the "proceeds thereof home," valued at \$4000, on the outward voyage, but the policy to be open on the proceeds. The goods arrived in safety at Batavia, but from some cause not appearing in the case, were re-shipped for New-York, and were damaged on the voyage home. This partial loss, the plaintiff sought to recover, and the question was, whether the identical goods, forming the outward cargo, were covered

(a) 1 Phil. 47.

by the word "proceeds," on the return voyage. The plaintiff on the trial offered to prove, that in similar cases the word "proceeds," as a mercantile word in usage, was understood among merchants, to include the same goods on the return voyage, but the presiding judge rejected the evidence, and the supreme court upon an application for a new trial, confirmed his decision. The Court of Errors, however, adopting the opinion of the Chancellor, reversed the judgment of the Supreme Court, upon the ground that the evidence offered ought to have been received. Chancellor Walworth, in his opinion, after admitting that the "proceeds" of a cargo, in the ordinary understanding of the term, does not mean the specific article of which the original cargo was composed, proceeded to say, "A policy of insurance, like every other contract, is to be construed by the popular understanding, or the plain and ordinary sense of the terms employed, unless those terms have received a legal construction, or have acquired a technical meaning in reference to the subject matter of the contract. If the terms employed, have received a settled legal construction, that must govern, *and no evidence of a particular custom or usage in opposition to such legal construction can be received.*" I pause to observe, that this general position, that evidence of a usage cannot be admitted to vary the legal construction, if true at all, is only so in a very limited sense. It will be seen hereafter, that in many cases, the effect of a usage admitted in evidence, has been to vary the settled legal construction of the words or clause to which it applied, (*Note 12.*) The chancellor then, after reciting the offer made by the plaintiff on the trial, quotes several of the cases of which an abstract has already been given as directly applicable, and concludes as follows: "Upon the principle of these cases, if the plaintiff could have shown a settled usage among commercial men, to consider the same specific articles, when brought back upon the return voyage, to be the proceeds of the outward cargo, and to be included in that term, he would have been permitted to give such evidence to the jury. It is doubtful whether a settled usage of that kind could have been established by proof, but we cannot judicially say such a usage does not exist, and as the evidence was offered and rejected, I think, that decision was erroneous, and that the judgment should be reversed."

It cannot be denied that this case has carried the doctrine, that a usage may control the ordinary meaning of the words of a policy to its utmost limits of propriety, since the evidence offered, instead of being merely explanatory, seems to involve a direct contradiction; yet I am not prepared to say that a court would not be fully justified in adopting this strange construction of the word "proceeds," which confounds a cause with its own effect, if it were clearly proved that in numerous instances, and in all that had occurred, this construction had been admitted and followed by the insurers in the settlement of actual losses. When particular words are used by the parties in an instrument in a distinct and peculiar sense, that sense, if manifest from the context, however different from, and even repugnant to their ordinary meaning, will govern the construction, and the result is the same when the intent of the parties to use the words in a particular sense is equally manifest from extrinsic circumstances. The practical interpretation of the policy, if established and notorious, would probably furnish this evidence. But the offer made on the trial in this case was very far from being of this character, and without a further explanation of the terms in which it was expressed, ought certainly to have been rejected. It was neither an offer to prove the commercial meaning of the word "proceeds," as used and interpreted in other mercantile instruments and contracts, nor its meaning in the policy, as settled by use and practice between the assurers and the assured. The offer was only to show that the word "proceeds" was used by merchants, and was understood by them, to include the same goods on a return voyage, in a case like that before the court; that is, where the policy was expressed in the same words. Now, if the evidence given had exactly corresponded with the offer, it would have had no tendency to prove a usage. It would merely have proved how the witnesses thought the word "proceeds," as used in the policy, ought to be interpreted; not that this interpretation had, in a single instance, been adopted and followed.

Allegre v. Maryland Ins. Co. (6 Harr. & Johns. 408.) In this case evidence was offered and received, that by the usage of all the insurance companies at Baltimore, where a

partial loss was claimed upon goods, the original invoice was an essential part of that proof of interest which the policy requires, and that such losses were never paid unless upon its production. Upon an application for a new trial, it was insisted, that this evidence, not relating to a usage of trade in the proper sense of the term, ought not to have been received; but the objection was overruled by the court, upon the ground, that evidence of a usage in the practical interpretation of the policy was as proper to be received as of a usage of trade.

To this decision that of the Superior Court of the City of New-York, in *Rankin v. The Am. Ins. Co.* (1 Hall, 619,) is directly opposed. In that case, the defendants offered to prove that in order to charge the underwriters with a partial loss on goods that had arrived at that port, a survey made by the portwardens on board the vessel before the goods were discharged, showing that they were properly stowed, and had been damaged by the perils of the sea, was, by an established usage, between the assured and the assurers, an indispensable document, as a part of the preliminary proof. The evidence was rejected by the Chief Justice upon the trial; and upon a motion to set aside the verdict, his decision was confirmed, chiefly upon the ground, that the sufficiency of the preliminary is always a question of law to be determined by the judge on the trial, upon the production of the papers that were in fact exhibited to the underwriters; and that upon such a question, the testimony of witnesses is wholly inadmissible, since if admitted upon the one part, it might be contradicted on the other, and the judge would thus be drawn into a trial of a question of fact, instead of confining himself to the decision of the law, his proper and sole province. It was determined in the same case that the evidence offered could not be received to bar the plaintiff's recovery, upon the grounds that the alleged usage contradicted the legal construction of the policy, and the plain import of its terms, and was in itself unreasonable, as making the rights of the assured depend upon the acts of third persons, over which he had no control. This last objection is strong, and perhaps decisive; but it was certainly no objection that the usage would have varied the construction of the policy; nor

does there appear to have been any other contradiction between its terms and those of the policy, than exists in other cases. The evidence would not have rendered a single word of the policy inoperative, but would only have qualified the promise of an indemnity, by making it conditional upon a compliance with the usage. Every usage that is obligatory upon the assured imposes a similar condition, and such is also the effect of every valid representation.

Rogers v. Mech. Ins. Co. (1 Story, 607.) The insurance was on "outfits" and "catchings," in a whaling voyage from New-Bedford, Mass., and the questions were—First, whether blubber, from which the oil had not been extracted, but which was stowed on board in the usual manner, was covered by the policy; and next, whether the underwriters were liable for a general average loss, occasioned by a quantity of this blubber having been thrown overboard; it being insisted that by the usage of trade in whaling voyages, blubber in the condition stated, is not considered as an insurable interest, nor entitled to, nor liable for, contribution. Upon this second question, Mr. Justice Story, in addressing the jury, made the following remarks: "There is no evidence whatever in the cause, that establishes any such usage or custom even in the port of New-Bedford; and had such a usage been shown to exist, it would be insufficient. The usage or custom of a particular port, in a particular trade, is not such a custom as the law contemplates to limit, or control, or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade applicable and applied to all the ports of the state where it exists; and from its character and extent, so notorious that all contracts of insurance in that trade must be presumed to be entered into by the parties in reference to it as a part of the policy. If the usage or custom be not so notorious, if it be partial or local in its existence or adoption, if it be a mere matter of private and personal opinion of a few persons engaged in the trade, it would be most dangerous to allow it to control the solemn contracts of the parties who cannot be presumed to know it, or to adopt it as a rule to govern their own rights or interests." The learned judge then made those remarks in relation to the entire insufficiency of the evidence, as showing merely the

opinions of the witnesses, that have been quoted in a preceding note,^(a) and concluded this part of his address with these weighty observations: "I own myself no friend to the indiscriminate admission of evidence of supposed usages or customs in a peculiar trade or business, and of the understanding of witnesses in relation thereto, which has in former times been so freely resorted to, but which is now subjected by our courts to more exact and well defined restrictions; such evidence is often, very often, of a loose and indeterminate nature, founded upon very vague and imperfect notions of the subject, and it should therefore, I think, be admitted with a cautious reluctance and a scrupulous jealousy, as it may shift the whole grounds of the ordinary interpretation of policies of insurance and other contracts." It is to be observed, that the usage attempted to be proved in this case, was not a usage of trade in the proper sense of the term, but a usage in the interpretation of the policy, and that in such cases, the only usage that can be permitted to govern the construction, is that of the place where the insurance is effected, since the usage can only be created by the concurrence of the insurers themselves in the settlement of losses; although the voyage insured was from New-Bedford, the policy was effected in Boston.

NOTE XII.

P. 197, § 44. I shall condense in this note all the more important cases in which a usage of trade has been admitted in evidence.

Tierney v. Etherington, (reported by Lord Mansfield, in 1 Burr. 348.) The insurance was on goods in a Dutch ship from Malaga to Gibraltar, and at and from thence to England, or Holland, and the policy contained an agreement that the goods might be unloaded at Gibraltar, and reshipped in one or more British ships for England or Holland. There

(a) Sup. Note IX.

was no British ship at Gibraltar when the vessel arrived there, and the goods, as was proved to be the usage, were unloaded and put on board a store-ship, in which they were lost in a storm. The question was, whether the underwriters were liable for this loss. Lord C. J. Lee, in charging the jury, said, "It is certain, that, in construction of policies, the *strictum jus* or *apex juris*, is not to be laid hold of; but they are to be construed largely, for the benefit of trade, and *for the insured*. Now it seems to be a strict construction, to confine this insurance only to the unloading and reshipping, and the accidents attending that act. The construction should be *according to the course of trade in the place*, and this appears to be the *usual mode* of unloading and reshipping in that place, viz: that when there is no British ship there, then the goods are kept in store-ships. This manner of unloading and reshipping, is to be considered as the necessary means of attaining that which was intended by the policy; and seems to be the same as if it had happened in the act of reshipping from one ship to another, and as this is the *known* course of trade, it seems extraordinary if it was not intended." The plaintiff obtained a verdict, which the Court of Kings Bench, upon application, refused to set aside.

In *Pelly v. Royal Exch. Assur. Co.*, (1 Burr. 341,) Lord Mansfield quotes and adopts the views expressed by C. J. Lee, and in his own opinion, with his usual clearness and force of language, states the grounds upon which a usage in the voyage or trade, is admitted to govern the construction of the policy. "The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it; every thing done in the usual course must have been foreseen, and in contemplation, at the time he engaged. He took the risk, upon the supposition that what was usual or necessary, would be done," and he subsequently remarked, "That what is usually done by such a ship, with such a cargo, in such a voyage," (that is as those insured,) "is understood to be referred to by every policy, and to make a part of it, as much as if it was expressed."

Noble v. Kennoway, (*Doug.* 510.) In this case the insurance was on ships, and goods, and merchandise, on a fishing voyage to the coast of Labrador, the risk on the goods, &c., to continue until the same should be there discharged, and safely landed. The ships arrived on the coast, one in the month of June, and the other about the middle of July, but the crews being employed in fishing, had taken out none of their cargoes, except small portions at leisure hours, when, on the 13th of August, they were both captured by an American privateer. The action was brought for the recovery of the loss upon the goods, and the defence was that there had been an unnecessary delay in the discharge of the cargoes, and that the loss was to be attributed to the negligence of the assured. To meet this defence, it was proved that the same course had been pursued in former voyages, for three years past; and evidence was also given, that the usage was similar in the trade to Newfoundland, and that in both cases it arose from, and was rendered necessary by the nature of the trade. A verdict was given for the plaintiff, which the King's Bench refused to set aside. Lord Mansfield, in giving his opinion, said—"The insurance here is on the ships and the goods *till landed*, and the defendant says, the plaintiffs have been guilty of an unreasonable delay in landing. That question was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has been only for a year; this trade has existed and been conducted in the same manner, for three years. It is well known that the fishery is the object of the voyage, and the same sort of fishery is carried on in the same way at Newfoundland, and I still think the evidence on that subject was properly admitted to show the nature of the trade."

The circumstances to be remarked in this case, are the recent origin and limited extent of the usage, and the admission of evidence as to a similar usage in a similar trade, to a different coast; but as the observance of such a usage, seems to have been almost a necessary result from the nature of

the trade, the court were probably satisfied with slighter proof of its existence, than they would otherwise have required. The effect of the usage in this case, it is also to be observed, was not to vary a settled construction, but to fix the application of an *indeterminate* clause. Where goods are insured until "safely landed," the law prescribes no certain period within which they must be landed, but in all cases, the time and mode of discharge, depend solely upon the nature of the voyage; and the usage, or custom of the port or place of destination. Where, from the novelty of the trade no such usage exists, the nature and design of the voyage, and the situation and character of the place of destination, must alone supply the rule. Hence, the Court of King's Bench in the case before them, might justly have decided, even had no usage been alleged or shown, that the course pursued was, under the circumstances, just and proper.

Hoskins v. Pickersgill, (*Marsh.* 727. *Park*, 126.) The insurance was on a ship, furniture, &c., in the usual words of the policy; the ship was employed in the Greenland fishery, and the question was, whether the words of the insurance covered fishing tackle and stores. Lord Mansfield, who tried the case, said, this would depend upon the usage of trade, evidently meaning, that the words of the policy, in their ordinary acceptation, were insufficient to cover the loss. The testimony as to the usage was contradictory, but the plaintiff obtained a verdict, which the court set aside, upon the ground that the weight of evidence was in favor of the defendant. This case is usually classed with those, in which the construction depends upon a usage of trade in the proper sense of the term; but it is evident that the usage attempted to be proved, had no relation to the course of the trade, or the mode of prosecuting the voyage. It related solely to the interpretation of the policy, and could therefore only have been established, by showing that it had been followed in the settlement of losses. The evidence, otherwise, would have been that of mere opinion, not resting upon any facts, but showing only how the words of the policy were understood by those engaged in the trade. What was the character of the evidence given, does not appear from the report.

Salvador v. Hopkins, (3 Burr. 1707,) *Gregory v. Christie*, (1 Park, Hild. 104,) and *Farquharson v. Hunter*. (1 Park, Hild. 105.) These cases all relate to ships in the East India trade, which, when insured, were known to the underwriters to have been chartered by the East India Company. The general questions decided were, that the terms of the charter parties, which were presumed to have been known to the insurers, the known usage of the trade, and the known practice of the company in the employment of vessels chartered by them, were all to be taken into consideration in construing the policy, and might give to its terms an interpretation, not only widely different from, but almost opposite to that, they could otherwise have received. In *Salvador v. Hopkins*, the terms of the policy are not stated, but it was decided that the insurance was not limited to the period of time mentioned in the original charter party, but that a new agreement having been made between the officers of the company in the East Indies and the master, for detaining and employing the ship one year longer, she was protected by the policy for this additional time, upon the ground, that it was the known and common practice of the company to make such new agreements in relation to the employment of chartered vessels, and, therefore, the chance of a ship being thus detained and her voyage prolonged, ought to be considered as a risk insured against. It was an event, which the underwriters knew might, and, probably, would occur. It is, however, to be observed that in this case there were many additional facts to strengthen the conclusion at which the court arrived; particularly, that the detention of the vessel for another year, if known at the time of the insurance, would not have varied the premium, and that the underwriters, when fully apprised of the new agreement, acquiesced in the insurance.

In *Gregory v. Christie* the insurance was on goods, &c. on board the ship on her voyage from London to Madras and China, with liberty "to touch, stay, and trade at any port or places whatever." When the vessel arrived at Madras she was too late to go to China that year, and she was employed by the East India government to go from Madras to Bengal for a cargo of rice. She performed the voyage,

returned, and was lost upon a second voyage of the same character. The jury found a verdict for the plaintiff. Upon an application for a new trial, it was insisted that the intermediate voyages to Bengal were not covered by the policy, for that the permission to touch, stay, and trade at any ports or places whatever, referred only to ports or places *in the course of the voyage*—a new trial was refused. Lord Mansfield said, "To understand this policy you must refer to the course of trade to which it relates. What is the course of trade with the East India Company? If an India ship comes to Madras too late in the season to proceed to China, the council employs her in an intermediate voyage. It is beneficial to all parties so to employ her. The underwriters are perfectly well acquainted with this usage, and are bound to know it." His lordship was also of opinion that the words of the license given by the policy, being not merely to touch and stay, but also to trade, were sufficiently large to take in the intermediate voyage, and that the usage merely confirmed the construction.^(a)

In the subsequent case of *Farquharson v. Hunter*, the voyage was from London to Madras and Bengal, with liberty to touch or stay at any port or place (omitting the words "and trade") in this voyage. The vessel arrived at Madras, made an intermediate voyage to Visagapatnam, returned, then proceeded to Bengal, and was captured on the passage. On the trial Lord Mansfield was of opinion, that the words of the policy being narrower than in *Gregory v. Christie*,

(a) It was also decided in this case, that under the general words of the policy "goods and effects," the assured was entitled to recover for the loss of monies upon respondentia, it being proved that this sort of interest was always insured in this manner in the East India trade; in other words, that such had always been the practical interpretation of the policy in that trade. It would be impossible to give a more striking instance of the prevalence of a usage over a general rule of law, and a settled construction of the policy. In a previous case, Lord Mansfield had emphatically declared that it was now established as the law and practice of merchants, that respondentia and bottomry must be specified in the policy. *Glover v. Black*, (3 Burr. 1394,) and such has always been the rule in foreign countries as well as in our own.

were not sufficient to cover the intermediate voyage, and the plaintiff was nonsuited. The Court of King's Bench, however, set aside the nonsuit upon the ground that the usage as to intermediate voyages being notorious to both parties, ought to have governed the construction. The usage was therefore, in this case, the sole ground of the decision, and was permitted to overrule, not merely the legal construction, but, it would almost seem, the express words of the policy, as the liberty to touch and stay was limited in terms to any port or place in the voyage insured. The difficulty is only got rid of by applying the usage to modify the construction of the words "this voyage." It does not appear from Mr. Park's report of this last case, whether any evidence of the usage was given on the trial, or whether it was so well established and notorious, that the Court took judicial notice of it without proof.

Urquhart v. Barnard, (1 *Taunt.* 450.) The policy was on a ship from Lisbon to Madeira and Santos in South America, with liberty to touch at one of the Cape de Verd Islands. The vessel touched at Bonavista, one of the Cape de Verd Islands, remained there several days, and took on board a considerable quantity of salt, and it was insisted that the delay and the loading, as they increased the risks, amounted to a deviation that avoided the policy. To meet the objection, proof was given that the insurer knew, before he agreed to the policy, by an express communication of the fact, that it was intended that the vessel should take in salt at Bonavista, and upon this evidence a verdict was given for the plaintiff, which the Court of Common Pleas refused to set aside. Mansfield, C. J., in giving the opinion of the Court, remarked that it was truly said upon the argument, "that if a general custom had been proved for ships from Madeira to Santos to call at the Cape de Verd islands to take in salt, it would have been a sufficient answer to the objection that imputes a deviation, and upon what principle? Because if the underwriters know by the general custom of trade, that the touching at those islands is for the purpose of taking in salt, the assured are entitled to do it. If, then, the underwriter knows the same thing by means of an express communication of the purpose of trading which in this

instance, is proved to have been made, it is the same thing as if he had notice by the general usage of the trade."

It is worthy of remark, that the voyage and trade insured were in this case strictly foreign, and the persons for whom the insurance was made, foreign merchants, and that the court in speaking of the necessary efficacy of a usage, had one been proved, take no notice of the distinction of *Mr. Marshall*, that the insurer is not presumed to know the usages of a foreign trade.^(a)

Constable v. Noble, (2 Taunt. 403.) The insurance was on flour, at and from Lyme to London. The flour was loaded at Bridport, which, although within the custom-house limits of the port of Lyme, is a separate harbor, eight miles distant from the town of Lyme. The Court of Common Pleas held, that the policy did not attach, and *Mansfield, C. J.*, said, "If the plaintiff in this case, could have proved a usage for ships to load at Bridport, upon a policy at and from Lyme, it might have assisted him; but no such usage was proved."

Moxon v. Atkyns, (3 Camp. 200.) The policy was on goods "at and from Amelia Island," but the goods were in fact taken on board at Tiger Island, which is a small uninhabited island in the river St. Mary, near Amelia Island. The vessel, however, cleared out from the latter island, where alone there is a custom-house, and it was proved to be the custom for vessels nominally bound, to and from Amelia Island, to discharge and load at Tiger Island. Lord Ellenborough, in charging the jury, said, "The policy cannot be literally understood, for there is no port at Amelia Island where the vessel could load. The real question is, whether there has been a loading at Amelia Island, within the meaning of the parties when the policy was effected. Strictly and literally, there has been no loading at Amelia Island, but it is possible that in mercantile contracts, Amelia Island may comprehend a region in which Tiger Island is included. The question here will be, whether upon this evidence the cargo can be said to have been loaded at Amelia Island, ac-

(a) 1 Marsh. 275. Vide ante, p. 199, § 46.

ording to the usage of such voyages. If it was, the policy attached, although no part of the cargo, literally speaking, had been on Amelia Island." The plaintiff obtained a verdict.

Gracie v. Mar. Ins. Co. (8 Cranch, 75.) The policy was on goods "until safely landed at Leghorn." They were in fact landed at the Lazaretto, about half a mile from Leghorn, and were lost while stored there, and before permission could be obtained to transport them to the city. It was proved to be the known and uniform custom to land goods of the description of those insured at the Lazaretto, and the underwriters, therefore, insisted that this was the landing contemplated by the policy, and that consequently they were discharged. The court adopted this construction. In giving their opinion, Marshall, C. J., said, "Whatever might be the effect, if the establishment of the Lazaretto, and the laws of quarantine, had been of so recent date, as not to have been in the contemplation of the parties to this contract, this cause may well be decided upon the usage found in this case; a usage of ancient date and general notoriety. When the parties stipulated that the adventure should continue till the goods were landed in safety at Leghorn, they knew that the place of landing was the Lazaretto, and that the landing would be made under the direction and control of the local authorities. This then must be the landing contemplated in the policy. It is the landing which terminates the risk. Had the parties intended to continue the risk during the continuance of the goods in the Lazaretto, they would have inserted in the policy words manifesting that intention."

Col. Ins. Co. v. Catlett, (12 Wheat. 386.) The insurance was on goods, and the principal question related to the true construction of the policy as to the subject of the insurance, whether it was confined to the original cargo out, or whether it embraced every successive cargo that might be taken on board in the course of the voyage insured, out and home, so as to cover a return cargo, the proceeds of the outward. The terms of the policy were "at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandise laden, or to be laden,

on board the ship Commerce, beginning the adventure upon the said goods from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c. and the United States," and these words, the underwriters insisted, could only be applied to the original cargo. Story, J., in delivering the opinion of the court, admitted that a strict grammatical construction might lead to that conclusion, but observed that policies had never been construed in that strict and rigid manner, but had always received a liberal construction with reference to the nature of the voyage, and the manifest intent of the parties. That in the present case, the true meaning of the policy was to be sought in an exposition of the words, according to the known course and usage of the West India trade, which the parties must be supposed to have tacitly adopted as the basis of their engagement. That it was unreasonable to suppose that the parties intended that the risks on the homeward voyage should apply to the goods originally shipped, which, according to the known course of the trade, and the very nature of the commodities, were not, and could not be, intended to be brought back to the United States. The court were, therefore, of opinion, that the policy was for the whole voyage round, and covered any return cargo taken on board at any of the designated ports in the West Indies.

Coggeshall v. Amer. Ins. Co., (3 Wend. 283.) The insurance was on goods laden, or to be laden, for and during the period of six months, extended by a memorandum on the policy for two months longer. The court held, that where such is the form of the policy, a trading voyage is evidently contemplated by the parties, and that, however often the goods may be changed, the policy attaches. The construction is to be the same, as if a trading voyage had been expressed, with liberty to touch and trade at any port or place whatever, subject to the usual and accustomed mode of doing business, at each port the vessel might visit. The loss, in this case, was claimed on a basket of *plata pina*, which had been purchased with the proceeds of the cargo first laden, and which was lost in the course of transportation from the shore to the vessel, on a balsa, a species of raft much used in some of the ports of South

America: and it appearing that this mode of loading vessels, although dangerous, was according to the known and established usage of the place where the loss happened, the insurers were adjudged to be liable.

NOTE XIII.

P. 200, § 46. The words of Marshall are "that the general rule is, that a liberty '*to touch at any ports or places,*' means only places in the usual course of the voyage, and this general rule must be considered as applicable to voyages undertaken by the ships of foreign nations, *unless the usage of the particular trade in which they are engaged, be made known to British underwriters, who cannot be presumed to be conusant of such usage.*" This was so determined in the case of *Lavabre v. Wilson*." Although these observations refer only to a special case, yet if true in this, they must be so in all others, where the trade and persons insured, are foreign.

In *Lavabre v. Wilson*, (*Doug.* 284,) the insurance was on a French ship, and the voyage was described as follows: "At and from Port L'Orient to Pondicherry, Madras, and China, and at and from thence back to the ship's port, or ports of discharge in France, with liberty to touch in the outward or homeward-bound voyage, at the Isles of France and Bourbon, and at all or any other place or places what or wheresoever;" and the policy contained this additional clause: "and it shall be lawful for the said ship, *in this voyage*, to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side of the Cape of Good Hope, without being deemed a deviation." The ship arrived at Pondicherry, but instead of proceeding to China, sailed from thence to Bengal, and returned to Pondicherry. It was insisted on the part of the underwriters that the voyage to Bengal (which was wholly out of the course of a voyage from Pondicherry to China) was a deviation by which they were discharged. In reply, the counsel for the plaintiff contended that the voyage to

Bengal was authorized by the express words of the policy which gave a general liberty of touching at all places whatsoever, and that, by the operation of these words, the voyage to Bengal was as much a part of the voyage insured as if it had been expressly named. Lord Mansfield, however, intimated a clear opinion that the general words were, by the expressions of "in the outward and homeward-bound voyage," and "in this voyage," so restrained as to mean "*all places whatsoever in the usual course of the voyage to and from the places mentioned in the policy,*" and the counsel for the plaintiff, yielding at once to this intimation, abandoned wholly this ground of recovery. No attempt whatever was made to prove that the voyage to Bengal was justified by a known usage, that could operate to enlarge the construction of the policy, nor was the existence of any such usage alleged or pretended, but the deviation was attempted to be excused upon the sole ground of necessity. It is possible, indeed, that Mr. Marshall meant to refer to this case merely as proving that the usual construction of "a liberty to touch," is applicable to policies on foreign vessels, and not, as evidence, that this construction cannot, in such cases, be varied by a usage not expressly made known to the underwriter. If so, this latter assertion is destitute even of a claim to authority.

NOTE XIV.

Long v. Allen, (2 Park, 797. Marsh. 661. 4 Doug. 276.) The insurance was on goods at and from Jamaica to London, and the ship was warranted to depart with convoy, and to sail on or before the 1st of August. She sailed before the 1st of August, but without convoy, so that the underwriters were discharged from the risks of the voyage. The action was for a return of premium, and a verdict was found for the plaintiff, subject to the opinion of the Court, on the preceding facts and on the express finding of the jury, "That it was the *constant and invariable* usage in insurances at and from Jamaica to London, *warranted to*

depart with convoy, or to sail on or before a certain day, to return the premium, deducting one half per cent, if the ship sailed without convoy, or after the day prescribed." The Court, affirming the verdict, decided that the usage entitled the plaintiff to recover. Lord Mansfield was clearly of opinion that the difficulties of apportioning a premium, that by the terms of the policy is entire, are cured when an express usage is found; and Mr. Justice Buller said, "The counsel for the defendant did right to make the chief question, whether any evidence of this usage ought to have been received. In mercantile cases from Lord Holt's time, and in policies of insurance, in particular, a great latitude of construction as to usage has been admitted. By usage places come within the policy that are not within the words. Usage explains and even controls the policy. The usage here found by the jury is universal, and though, in some cases, half per cent is a small premium for the risk 'at,' yet the underwriters are aware that it is so, and no inconvenience can result from it."

Mr. Phillips contests the propriety of Mr. J. Buller's language, that a usage may even *control* the policy, and says that "it is a well established principle that usage cannot control and set aside what appears by the policy, to be the plain intention of the parties."^(a) But this objection, as is evident from the cases that Mr. Phillips subsequently cites, is founded on a misconception of the meaning in which the word "control" is used by Mr. J. Buller. Certainly a usage cannot be admitted to contradict the policy, to expunge any of its word, or give to them a meaning that they are not capable of expressing; but to control, does not necessarily imply to contradict. The distinction made by Mr. J. Buller between "explaining" and "controlling" really exists, and his language is, therefore, perfectly accurate. Where the words to be interpreted are indeterminate or ambiguous, the usage *explains* them; but when they convey a definite meaning that the court would be bound to adopt, or their construction has been settled by law, the usage *controls*

(a) 1 Phill. 512.

them; and in these cases it does *set aside* what, judging alone from the terms of the policy or the rule of the law, was the plain intention of the parties; but in controlling, the usage does not contradict the words—it merely varies, by restraining or enlarging, their application.

Homer v. Dorr, (10 Mass. 26.) The action was on a promissory note, given on an insurance of goods and proceeds, out and home, and the payment of the whole amount was resisted upon the ground, that the risks of the homeward voyage had never attached, as the vessel returned without a cargo. It was proved to be the invariable practice in all the insurance offices in Boston, public and private, to return a portion of the premium on such policies, when the vessel returned without any cargo belonging to the assured, and that one half, except one per centum or one half per centum, is returned, unless a greater portion of the risk was applicable to the outward than to the homeward voyage, in which case, the sum returned was conformed to the estimated risk. The usage thus proved was liable to insuperable objections. It was indefinite, and it was local: it provided no certain rule. The insurer might deduct from the half he returned one per cent or one half per cent, and, if he chose to estimate the risks of the outward as greater than those of the homeward voyage, the amount to be returned seems to have rested in his sole discretion. So the usage, for aught that appeared, was limited to Boston, and did not extend to the other ports of Massachusetts; and it was justly observed by the counsel for the plaintiff, that if a usage was to be admitted at all, it ought to be the usage of the state, not that of a single port; but it was not upon these grounds, or either of them, that the Supreme Court of Massachusetts overruled the defence founded on the usage, but they confined themselves to saying—"The law applicable to this case is plain, well settled, and generally understood. Evidence of custom and usage is useful in many cases to explain the intent of parties to a contract; but the usage of no class of citizens can be sustained in opposition to principles of law." That this last position, in the sense in which it was applied by the court, is erroneous, is shown in the text, and in a subsequent note, (Note XXII.) and the

ion, looking at the grounds on which it was placed, it
ot be denied, is irreconcilable with that of Lord Mans-
and the King's Bench in *Long v. Allen*, which was
ited or referred to either by the counsel or the court.

uman v. Cazalet, (2 *Park*, 900. *Marsh*. 763.) The
y was upon a cargo of fish from Newfoundland, to
part of Spain, Portugal, or Italy. The ship met with
weather, and put into Alicant and Leghorn to repair.
captain, who was also owner, presented a petition to
ommercial court of Pisa, to adjust the general average,
the ground that he had put in for the benefit of all
rned. The court of Pisa adjusted the loss by charging
argo at its full value, but the ship only at one half, and
eight at one third, and also charged as part of the ge-
average, the seamen's wages, and provisions while in

The question was, whether the plaintiff, who, as
r of the cargo, had been compelled to pay, by the sen-
of the court at Pisa, a much larger sum than he would
been bound to pay by the law and usages of England,
ntitled to recover the same sum from the defendant,
nderwriter; and to prove that by usage he was so en-
, several insurance brokers were called, who said, that
peated instances they had adjusted averages under simi-
sentences of the court of Pisa, and that the under-
rs had always paid them. Mr. Justice Buller, in ad-
ing the jury, said—"On the general law, the plaintiff
d fail, but in all matters of trade, usage is a sacred
. I do not like these foreign settlements of average,
h make the underwriter liable for more than the stan-
of English law; but if you are satisfied it has been
sage upon the evidence given, it ought not to be sha-

The plaintiff accordingly obtained a verdict. I cite this
as illustrating the effect of a usage in superseding an
lished principle of law; but I consider it as now settled,
a general average as adjusted at the ship's ports of des-
on, according to the law or usage of the place, is bind-
upon the parties and the insurer, without evidence of a
sponding usage in the settlement of losses. *Simonds*
White, (2 *B. & C.* 805.) *Dalglish v. Davidson*, (5 *D.*
2., 6.) *Depau v. Ocean Ins. Co.*, (5 *Cowen*, 63.)
ng v. N. Y. F. Ins. Co., (11 *Johns.* 323.)

Vallance v. Dewar, (1 *Camp.* 503.) This policy was on a ship, freight, and cargo, "lost or not lost, at and from any port or ports in Newfoundland, to one port of discharge in Portugal, or to any port or ports in the United Kingdom." The ship arrived at Newfoundland in June, and was employed in banking, that is, in fishing on the banks until the 13th of October, when she began to take in her homeward cargo. She sailed for England on the 22d of December, and foundered soon after in a gale of wind. The defence was, that the underwriters had not been informed that the ship was to be employed in banking while at Newfoundland, and that by the banking, the risk was greatly increased, as the policy being "lost or not lost, at and from," attached immediately upon the ship's arrival at Newfoundland; and even if it did not, from the delay occasioned by the banking, the voyage home was turned from a summer into a winter one. It was also insisted, that whatever might be the construction where the insurance is on cargo only, which attaches from the time the cargo is loaded, a policy upon a ship "at and from," must attach upon her first being moored, in good safety, at the place, where the risk is to commence; and that no usage could control words so explicit. The reply to this defence was, that, according to the established usage of the Newfoundland trade, ships, after their arrival upon the coast, are either employed in banking, or make an intermediate voyage to some adjacent port, before they begin to take in their homeward cargo; and that of this, as of every other usage of trade, the underwriters were bound to take notice; and several witnesses, long acquainted with the Newfoundland trade, were called, who proved the usage to be as stated. It, however, appeared from the testimony, that ships sometimes found cargoes of fish ready cured on their arrival, and that, in such cases, there was no delay from banking or an intermediate voyage; and upon this evidence, it was objected, that the usage as proved was not uniform; and hence the underwriters were not bound by it. Lord Ellenborough: "The rule is, that the broker must communicate what is in the special knowledge of the assured, not what is in the middle between them and the underwriters. He is not bound to make a laborious disclosure of what is known to all. Is it

notorious, then, that ships in this trade, are either employed in banking, or take an intermediate voyage? If so, it must be presumed to be equally in the knowledge of both parties. According to the general import of the words 'at and from,' the policy would attach upon the ship's first mooring in a harbor on the coast: but it doubtless may be explained differently by usage; and as between these parties, the policy must be taken to be the same as if it had been expressed to attach upon the expiration of the banking or intermediate voyage. The underwriters were not liable for any antecedent loss, and cannot complain of what was previously done as a deviation. Although there should be exceptions to the usage, that would be immaterial. Things are presumed to go on in their ordinary course; and if an usage be general, though not uniform, the underwriters are bound to take notice of it." A verdict, under this charge, was given for the plaintiff. I would observe upon this case, that the instances in which ships found cargoes prepared for them on their arrival, could not be fairly considered as breaking the uniformity of the usage, if it was followed by all, who from the want of an immediate cargo, were forced to delay the voyage insured. It was only to the last, that the usage could apply. The first were not placed in circumstances to render its observance necessary or excusable. The usage properly described was a usage for all vessels not finding cargoes on their arrival, to engage in banking or an intermediate voyage; and thus described, it was uniform.

The case of *Ougier v. Jennings*, which is referred to in the text, and was much relied on in *Vallance v. Dewar*, will be fully stated in a subsequent note, as bearing more materially on another branch of the subject.

Kingston v. Knibbs, (1 *Camp.* 508, note.) The insurance was on a ship at and from Oporto to London. The ship, having taken in a portion of her cargo within side the bar of Oporto, went outside to take in the remainder, when she was driven out to sea in a gale of wind, and captured. The defence was, that the underwriters had not been informed that she was to take in any part of her cargo outside the bar. But several witnesses stated that it is usual for vessels to do so at Oporto, when, from the state of the river, they

cannot conveniently load entirely within the bar ; and though it appeared that, in policies at and from Oporto, liberty is sometimes expressly given to load on either side of the bar, Lord Ellenborough held, that the underwriters were bound of themselves to take notice of the usage, and the plaintiff had a verdict.

This case is not, properly, referable to the present head, but, I have deemed it expedient to give it, for the sake of a distinction, which it suggests. The policy contains no provision as to the mode in which the vessel shall take in her cargo, but there is an implied warranty—in other words it is a rule of law—that she shall follow, in this respect, the established usage at her port or place of departure. Hence, where a question arises on this subject, evidence to show the usage must of necessity be admitted ; but the effect of the evidence is only to determine, not to vary or supersede, the application of the rule of law. These cases, therefore, bear a direct analogy to those in which extrinsic proof is admitted to fix the application of indeterminate words, not to those in which a usage is allowed to vary the plain import of the policy, or supersede a known rule of law ; consequently, the evidence is not required to be of the same character and form. Where the attempt is to alter the plain construction of the policy, by evidence of a use and practice between the assurers and the assured, I apprehend, that even a few instances in which, by the express words of former policies, the existence of such a usage had been negatived, would be sufficient to disprove its validity. They would divest it of that uniformity which in this case the law requires.

NOTE XV.

P. 205, § 51. The reader will recollect that in *Coggeshall v. The Amer. Ins. Co.*, (*Sup. Note 12*.) the construction supported in the text was given to a time policy upon goods. The following case is a still more decisive authority—*Milward v. Hubbert*, (3 *Ad. & Ellis, N. S.*, 120.) The policy was upon time, and the action was brought by a ship-owner to recover

from his insurer a general average loss arising from a jettison of goods stowed upon deck. A plea in bar, which was demurred to, assumed that, in no case whatever, can the underwriter be liable for a direct or consequential loss of goods stowed upon deck. Upon the argument, the counsel for the underwriter contended, that it was no answer to the plea to affirm, that the loading of goods upon deck might be warranted by a particular usage, because the underwriter of a ship, upon a time policy, cannot be bound to take notice of the custom in every possible voyage that the ship might undertake; to which the Solicitor General (Sir W. W. Follet,) for the plaintiff replied, that the rule, that the insurer is bound to take notice of all customary risks, is just as applicable to a time policy, as to any other; that the party who insures a ship on time undertakes the risk upon all voyages—his contract is, therefore, the same as it would be, if all the voyages, that can be performed in the time, were expressly mentioned in the policy. Lord Denman, C. J., in delivering the judgment of the court, takes no explicit notice of this question, but, in deciding that the plea was an insufficient bar, because the stowing of goods on deck might well be justified by the particular usage of the trade in which the vessel was employed, he plainly repudiates the distinction on which the counsel for the underwriter relied; so that the judgment of the court was, in effect, a determination, that the usage of any and every trade in which a vessel, insured by a time policy, may happen to be employed, may be given in evidence to charge the insurer.

1

OF THE
CONSTRUCTION OF THE POLICY.

LECTURE II.—PART II.

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§ 52. I shall now proceed to inquire into the constituent qualities and essential requisites of a valid usage; an inquiry that, as it embraces all the different kinds of usage, it was proper to defer, until the rules distinctively applicable to each, had been fully stated and explained. The true and sole object of the introduction of a usage, we have already seen, is to discover, in order to effectuate, the probable in-

tentions of the parties ; and hence the character of the usage must be such as to raise and warrant the presumption, that it was known to the parties, and was in fact adopted by them as the basis of their contract ; or, as it is more commonly expressed, that their contract was made in reference to its existence. Those qualities and conditions, therefore, of a usage, upon the existence of which the validity of this presumption depends, are its essential requisites, and to ascertain and define these, is the object of our present inquiry. Before I proceed to this inquiry, however, it is proper to remark, that the observations I shall submit, are intended to refer exclusively to those cases in which the effect of the usage is to vary the construction, that it would otherwise be the *certain* duty of the court to adopt, or to supersede a rule of law, that otherwise would *certainly* be applied. Where the words or clause to be interpreted are indeterminate or ambiguous, or the rule of law proper to be applied, doubtful and unsettled, much slighter evidence, than is necessary to be required, in the cases I have mentioned, may doubtless be admitted, to control and fix the hesitating judgment of the court ; since upon this supposition, the interpretation or rule that the evidence may suggest, if just as consistent as any other with the terms of the policy, is one, that the judge, had no such evidence been given, with entire propriety might have adopted. A few instances, therefore, in cases thus doubtful and balanced, in which a particular interpretation or rule has been followed, although wholly insufficient to constitute a usage, in the proper sense of the term, may yet be sufficient to give a preponderance to the scale into which they are cast ; nor

am I prepared to say, that in these cases, a judge, doubtful in his own mind, and anxious to arrive at a just conclusion, may not with propriety listen even to the opinions of witnesses of experience and skill, conversant with insurance; not indeed as evidence, but with a view to assist the exercise of his own judgment. It may well happen, that the reasons which such witnesses assign for their opinions, although they might not readily have occurred to the mind of the judge, are satisfactory in themselves, and perhaps conclusive; and hence, while he rejects the opinions, as evidence to be submitted to the jury, he may yet consistently adopt the reasons, upon which they are founded, as the grounds of his own decision. It is certain, at least, that a course resembling this was frequently followed by Lord Mansfield, whom, it is not extravagant to represent, as the founder of our commercial law.(a)

§ 53. It is indeed intimated by Mr. Marshall, that it is only when the construction, or law, is doubtful, that evidence of a usage can with propriety be received at all; and it must also be confessed, that his language on this subject has been adopted by judges of deserved reputation and high authority.(b) But that this opinion is erroneous, is mani-

(a) Note XVI. *Bean v. Stupart*, (*Doug.* 13.) *Eden v. Parkinson*, (*Doug.* 732.) *Bermond v. Woodbridge*, (*Doug.* 783.) *Gardner v. Crossdale*, (2 *Burr.* 906.) *Lewis v. Rucker*, (2 *Burr.* 1168.)

(b) "Where the law is clear, it must prevail;" (*Marsh.* 707.) Mr. J. Washington, in *Winthrop v. Union Ins. Co.* (3 *Wash. C. C. R.* 7;) and Mr. Chancellor Walworth, in *Dow v. Whetten*, (8 *Wend.* 160.) Mr. Phillips also says, "The resort to usage for a construction, presupposes a question to be determined; for if the language of a policy be plain, beyond all question, there is no need of any proof of a usage; nor if the law be well settled." (*Phil.* 48.)

fest from the instances that have been already cited; and upon an examination of the decisions it will appear, that in a large majority of the cases, the effect of the usage, as proved, was to set aside a construction, or supersede a rule, that the court must otherwise, of necessity, have followed. Thus, where a vessel is insured with "liberty to touch" at a particular port, it is the settled construction of the clause, that if the vessel stay and trade, instead of merely touching at the designated port, it is a deviation that discharges the insurer; yet if in a particular trade, it is proved to be the usage, that vessels insured under such a policy, are allowed to take in a cargo, or in other words, stay and trade, and not merely touch, the usage enlarges the license as expressed in the policy, and gives to its words a meaning, that otherwise could not have been ascribed to them. The usage, therefore, overrules and sets aside a plain and settled construction.(a)

Thus also: The rule of law is established and certain, that authorizes the insurer to retain the whole of the premium, where the risks, when indivisible, have commenced; but where there is a known usage, in a particular trade, for the underwriters to return, in certain cases, a portion of the premium, which by law they might have retained, the usage, we have already seen, has itself the force of law, and creates an exception from the general rule that the court are bound to admit.(b) The law is clear, yet the usage prevails.

So, in the cases where a usage is applied to limit

(a) *Urquhart v. Barnard*, (1 *Taunt.*) 450.) Note XII.

(b) *Long v. Allen*, (2 *Park*, 797.) Sup. Note XIV. 244.

the application of general words, whether by showing their commercial meaning, or their practical interpretation, there is no question upon the language of the policy; it is plain and unambiguous, and the invariable effect of the evidence is, therefore, to alter the construction that the court would otherwise have been bound to adopt. General words, such as "corn," "roots," and others of similar extent, although capable of application to a great variety of subjects, are not, for that reason, indeterminate or ambiguous; but their meaning, when the intention of the parties to use them in a restricted sense, is neither apparent from the context, nor rendered so by extrinsic proof, however numerous may be the individual subjects they embrace, is definite and certain; and it is in this their known and established sense that the court would be bound to understand and apply them. Similar remarks will be found to apply to nearly all the reported cases, and it may, therefore, be stated, as their general and necessary result, that a usage, sufficiently and clearly proved, has a controlling effect, to vary the plain import, or settled construction, of the words of the policy; or to prevent the application of an established rule of law, by which the rights of the parties, under their contract, would otherwise be determined. (a) It is plain, however, that in cases where the intention of the parties, or the rule of law proper to be applied, would otherwise be considered as manifest and certain, the evidence *by which a different in-*

(a) *Preston v. Greenwood Ins. Co.* (4 *Doug.* 28.) Lord Mansfield says, "Usage is always considered in policies of insurance even when no difficulty arises on the words themselves," evidently meaning, even when the words and the construction are plain and unambiguous.

tent or rule is to be substituted, should be so clear, positive, and full, as to produce, by its necessary effect, the entire conviction of a reasonable mind. Where the question, whether the usage is such as to justify the presumption, that the contract was made in reference to its existence, remains in doubt, the interpretation that the words suggest, or the rule that the law prescribes, should always be admitted to prevail. The substituted intent or rule should be, at least, as certain as that it seeks to displace. That is, it should be as certain upon *the evidence*, as the other on the face of the policy. (a)

§ 54. It is to be collected from the decisions, that in these cases, a usage, that can alone be allowed to control the interpretation of the policy, or vary the legal rights of the parties, must be *general, uniform, notorious, reasonable; and consistent with the terms of the policy, and to a certain extent with the rules of law*. I do not mean to affirm that, in any single case, all these are stated as the necessary properties of a valid usage, or that in any, the terms, used to describe them, have been defined with the precision they will be found to require. It is only from an attentive consideration and comparison of all the cases, that these essential requisites of a usage can be deduced, and it is by the same pro-

(a) In *Edie. v. The East India Comp.*, (2 Burr. 1231,) where the usage, had it prevailed, would have set aside a general rule of law. Lord Mansfield says, that, "upon the trial he recommended to the jury to consider well of the evidence, and if they found a usage so established and settled amongst merchants and traders as to be clear *and plain beyond doubt*, then they might find a verdict for the defendants, but if they were doubtful of the usage, or it appeared to them not to be clearly and fully established, they ought to find for the plaintiff." The observations of Mr. J. Story, in *Trott v. Wood*, are to the same effect. (Note XIX.) Vide also the judicious observations of Mr. Philips, 2 Phil. 733.

cess, that we must ascertain the sense in which the terms, used to describe them, are properly to be understood. The observations I shall make are to be considered as the result of such a comparison.

§ 55. *The usage must be general.* The word general is used in various senses. It is used in reference to places as well as persons. In the first sense, it is opposed to "local," in the second, to "partial." In another sense, it embraces the whole of the subjects to which it relates, and is opposed to "special" or "particular." Thus a general law, is a law embracing, in the scope of its application, the whole community, as distinguished from a law, applying only to a particular class or classes. It is in one or more of these senses, that the word will be found to apply to the different kinds of usage; its application, in each case, depending on the nature and extent of the usage.

When the alleged usage relates to the commercial meaning of a word, as distinguished from its popular sense, I apprehend, it must be general among all the merchants residing in the same country, subject to the same government, and speaking the same language, who are engaged in the trade, in the prosecution or transaction of which the word is commonly employed. If the trade is confined to a single port, the usage, although local, yet if general in respect to persons, may still be valid; but if the same trade is carried on from several ports, the usage must exist in all, and in each must be followed, if not by all, yet by so large a majority of the persons concerned in the trade, that its prevalence shall constitute a rule, to which the exceptions are few and occasional—for such is

the meaning, that the word, "general," when not used as equivalent to universal, properly implies and denotes. A merchant of Charleston, effecting in New-York an insurance upon "skins," would not certainly be bound by a restricted and technical sense of the word, generally followed by the importers of skins in that city, if the word continued to be used by the importers at Charleston, in its true and largest sense. It would be unjust to impute to him the knowledge of a usage thus limited and local, and the presumption, that his contract was made in reference to its existence, would wholly fail. For the same reasons, the insurers of New-York would not be bound by the technical sense of a word, as distinct from its popular meaning, adopted by the merchants of Boston or Philadelphia, when the assured happens to belong to the place where the usage exists, unless the word had a necessary connection with a trade which they had been accustomed to insure, and which was carried on exclusively from that port.

Similar remarks will be found to apply to a usage of trade, in the proper sense of the term. If it be general, it must appear to be followed by a very large majority of the persons and vessels engaged in the prosecution of the trade, and when that trade is carried on from several ports, the usage must be general in each. Such is the generality, that seems necessary to be required, in all cases, where the parties are to be charged with the knowledge of a usage from the mere fact of its existence. When the assured resides in a port from which the trade has long been carried on, but where the alleged usage is unknown, or partial in its adoption, it

would be unreasonable to suppose that he meant to adopt it, as the basis of his own contract, and a usage, which, as general, is not binding upon the assured, cannot *merely as such*, be binding upon the insurers, although other circumstances may exist, to charge them with notice of its existence, and the intention to adopt it. It is not meant, for example, to deny that the insurers are bound in all cases by a usage, generally followed, and notorious, of the port in which they reside, however widely it may differ from the general usage of other ports engaged in the same trade. Their residence, where the usage, although local, is otherwise valid, would doubtless be deemed sufficient evidence of their knowledge.

§ 56. It is in a sense widely different from that which has been stated, that the word "general" is to be understood in reference to a usage in the interpretation of the policy, or superseding a rule of law, that would otherwise be applied. In these cases, it is to be understood, I apprehend, in its proper and etymological sense, as embracing, not merely a majority, but all the persons within the jurisdiction of the state where the insurance is made, upon whose acts, the existence of the usage depends. A usage in the interpretation of the policy, is the substitute for a judicial decision, and that which supersedes a rule of law, has itself the force of law, in the cases to which it applies. Now it is an essential characteristic, both of a judicial decision and of a rule of law, that it extends to *all* persons, and is invariable in its application to *all* cases exactly similar in their circumstances, and it seems a necessary consequence, that the substi-

tuted usage must possess the same character and the same extent of obligation. It must appear to be followed by all persons in all the instances to which it is properly applicable ; and where there are several ports in the same state, in which similar insurances are made, the usage to be general, must prevail in each. Of twenty insurance companies in the city of New-York, should it appear that fifteen had uniformly followed a certain rule in the settlement of particular losses, but that the practice of the remaining five was wholly different, and consonant to the interpretation or rule that the Court, without evidence of a special usage, would be bound to adopt; the usage, although embracing so large a majority of the insurers, would be partial, not general. It would bind each company by which it was adopted, and their known customers, but certainly would not be binding upon the dissenting companies, nor upon strangers.

It is not, however, necessary, that a usage in the interpretation of the policy, or superseding a rule of law, should, in the United States, be general, in the sense of extending to all the ports, in which policies are used, in the same form, and containing the same provisions. It is sufficient, if it be so within the jurisdiction of the state where the policy is effected. The interpretation of the policy, and the rules to be followed in the settlement of losses, depend, in all cases, upon the municipal law ; that is, the law of the state where the insurance is made, and whether the evidence of that law be derived from usage or from judicial decisions, can make no difference in the application of the principle. It is

true, that in some cases a usage of trade in one state, by which I mean a usage of trade in the proper sense of the term, may affect the construction of a policy made in another, and such is the effect, whenever it is proved, or there are just grounds for presuming, that the contract was made in reference to the usage ; but, with this single exception, the construction of the policy, and the rules to be followed, in the settlement of losses, are to be sought exclusively in the laws and usages of the state where the insurance was effected ; and these alone are presumed to have been in the contemplation of the parties.(a)

§ 57. The proposition that a usage must be general, in order to bind the parties, refers exclusively to the cases in which the knowledge of the parties, and their intention to adopt the usage are inferred merely from the fact of its existence ; but when their knowledge, or intentions, are established by other direct or circumstantial proof, their contract will be governed by the usage, however local or partial, in reference to which, it is proved or presumed to have been made. Thus, the use and practice, as between themselves and the assured, even of a single insurance company, will be binding, not only in all cases upon the company, but upon all such persons as have been in the habit of effecting policies at their office. So, by parity of reasoning, a local usage of trade may be binding upon insurers who have frequently made insu-

(a) Note XVII. Marsh. 156. *Cutter v. Powell*, (6 Term, 320.) *Martin v. Del. Ins. Co.*, (2 Wash. C. C. R., 254.) *Trott v. Wood*, (1 Gallis, 443.) *Crosby v. Fitch*, (12 Conn. 422.)

rances to which the usage would apply, and, however local or partial, may be the usage, the insurers will be bound, in all cases, when the intention to follow it was expressly communicated, and the policy was founded upon that representation. (a)

§ 58. *The usage must be uniform, as well as general.* It is not necessary that the usage, when it is a usage of trade, or in the technical application of words, to be uniform, should be universal; that is, should be followed, at all times, by all persons or vessels concerned or employed in the trade to which it relates; for this would be inconsistent with the meaning which, in these cases, is attributed to the word general: (b) but the word "uniform" certainly denotes, in all cases, a constancy in the observance of the usage in the form that properly belongs to it, and according to its character and extent. Thus a usage, arising from the acts of a majority of the persons connected with a particular trade, must be constantly observed in the same manner by such a majority, although the persons composing that majority may, doubtless, vary. The usage must preserve, at all times, its essential character. It must not now be general, and then local or partial, be followed this year or month, and abandoned the next. To render it uniform, its observance must be without interruption in time, or change of material circumstances.

(a) Note XVIII. *Gabay v. Lloyd*, (3 *Bing.* 793.) *Palmer v. Blackburne*, (1 *Bing.* 61. 2 *Phil.* 734.) *Vallance v. Dewar*. *Ougier v. Jennings and Kingston v. Knibbs*, (1 *Camp.* 505-8.)

(b) It is in this sense, however, that the word is used by Lord Ellenborough, in *Vallance v. Dewar*, where he says that if a usage of trade be general, it is not necessary that it should be "uniform." Vide Note XV.

Where the usage settles the construction of the policy, or supersedes a rule of law, its constancy of observance to render it binding, it has been already stated, must be *invariable*, in all cases, where no other evidence is given, to show that the usage was meant to be adopted. (a)

§ 59. The reasons why a usage must be general and uniform, to justify the presumption, that the contract was made in reference to its existence, are obvious and conclusive. Where the usage is local, or partial, or irregular; where it varies in its essential circumstances; is sometimes followed and sometimes abandoned, the party against whom it is alleged, without an express communication of the fact, was not bound to know, or believe, that it was intended to be applied or followed. The opposite inference was just, or nearly, as probable, and this uncertainty in the observance of the usage is fatal to the presumption, that he meant to adopt it as the basis of his contract.

§ 60. Nor is it sufficient that the usage be *general* and *uniform*; it must also be *notorious*. It must have existed, as general and uniform, for so long a time, as to warrant the presumption, that it was known to the parties when they made their contract; and as there are no special grounds for imputing this knowledge to them, the evidence must be sufficient, to warrant the presumption, that it was known to all in similar circumstances; that is, merchants connected with the trade and insurers. The notoriety of a usage does not mean that it must be

(a) Note XIX. *Planche v. Fletcher*, (Doug. 451.) *Power v. Whitmore*, (4 M. & S. 150.) *Long v. Allen*, *Newman v. Cazalet*.

known to the whole community in which it prevails. It is doubtless sufficient if it be known to all, such as merchants, ship-masters, and others, who are concerned or employed in the trade, to which the usage, directly or indirectly, relates; and to all whose interest, or duty, it is to acquire the knowledge of its existence, such as insurers, insurance brokers, and settlers of average. The law has prescribed no certain period, during which the usage must have prevailed, to render it valid; and it was once remarked by Lord Mansfield, that the usage even of a single year may be sufficient to charge the insurer.^(a) We are always in danger of being misled by the remarks of eminent judges, especially, when expressed in those terms of decision that are natural to superior minds, when we fail to attend to the special circumstances of the case, in which they were made; since it is always probable, that the necessary, or proper limitation, that those circumstances suggest, although omitted to be stated, was present to the mind of the judge, and influenced his opinion. In the case in which this pointed observation was made by Lord Mansfield, very slight, if any evidence of a usage was necessary to render the insurers justly liable for the loss; and the evidence, in fact, received, was much inferior in cogency to that, which, in the cases we are now considering, it is indispensable to require. Generally speaking, it can rarely happen that a custom of such recent origin and short duration as of a single year, can have become invested with the qualities, that constitute its

(a) *Noble v. Kennoway*, (*Doug.* 513.) See the observations on this case in Note XII.

necessary title to the character and name of a legal usage. Of such a usage, it cannot often be predicated, with truth, that it is either general, or uniform, or notorious; a usage yet in its infancy, or struggling for existence, with a different and hostile practice, is not established, and has, therefore, no just claims to our obedience. We cannot be required to confess its sway, until its supremacy be certain and uncontested. (a)

§ 61. The required notoriety of a usage, in all the cases, in which its existence may be alleged, may suggest a difficulty to a reflecting mind, that it seems necessary to meet. It has been stated, that the insurer, when ignorant of the usages of the trade he is desired to insure, is bound to inform himself by inquiry from the assured; and, at first view, it seems unreasonable to require presumptive evidence of his knowledge of a fact, which it was thus his duty to have ascertained, instead of imputing to him that knowledge, in all the cases, in which the inquiry has been omitted. The reply is, that it is the duty of the assured, to communicate to the insurer all facts, that tend to increase the risks, with the exception only of those, that he has the right to presume, are already known to the insurer, as well as to himself; but he has no right to act upon this presumption, unless the usage he intends to follow, is in it-

(a) *Planche v. Fletcher*, (2 *Doug.* 251.) Note XIX. *Long v. Allen*, (3 *Park*, 797.) Note XIV. *Gregory v. Christie*, (1 *Park*, 104.) Note XII. *Martin v. Del. Ins. Co.* (2 *Wash.* 254.) Note XVII. *Trott v. Wood*, (1 *Gallis* 443.) Note XVII. *Rogers v. Mech. Ins. Co.*, (7 *Story*, 607.) Note XI. In *Smith v. Wright*, the Supreme Court of New-York say—"The true test of a commercial usage is, its having existed a sufficient length of time to have become generally known, or warrant a presumption, that contracts are made in reference to it." (1 *N. Y. Term R.* 45.)

self public and notorious. Unless its existence and terms are known to all others equally interested, he has no right to believe, that they are known to the insurer; consequently, it is only in such cases, that the insurer, by omitting to inquire, takes upon himself the risk of the existence of the usage, and is precluded from averring his ignorance. The assured is equally bound to inform himself as to the existence of a usage by which his own rights may be affected; but his omission to inquire has never been deemed sufficient to charge him with knowledge. He is not bound by the usage, unless its character be such, that he ought to have known of its existence; in other words, unless it be general, uniform and notorious. The case of the insurer is precisely the same.

§ 62. In stating that generality, uniformity, and notoriety, are the essential requisites of a usage, it is not meant to affirm, that its possession of these qualities is necessary, in all cases, to be established by direct affirmative proof; for where the usage prevails in several ports, embraces an extensive trade, or a large number of persons, the production of such proof would be impracticable. It is doubtless sufficient, if it appears that in numerous instances, and for a long period, the usage has been observed by a succession of persons, without any intermission of time, or variation of circumstances; and upon such evidence, if uncontradicted, the jury will be warranted to find, that the usage is, in truth, general, uniform and notorious.

§ 63. *The usage to be valid must also be reasonable.* It must not tend to increase extravagantly or indefinitely the risks that the underwriter meant

to assure, or to deprive the assured of the whole, or a large portion, of the indemnity on which he certainly relied. It must not lead to consequences that could not have been contemplated by the parties, thus repelling the presumption, that they meant to adopt it, as the basis of their contract.

§ 64. Where a time policy upon a vessel contains a conditional provision for its continuance, that, if construed according to the wishes of the assured, would enable him to retain the insurance in force during the life-time of the vessel, without a proportional increase of premium, as it is incredible, that the insurer could have meant to enter into a contract, involving, almost, the certainty of a loss, the construction, it has been justly decided, may be rejected as unreasonable. It is manifest, that such a construction would not be rendered, at all, more probable, or reasonable, by evidence of a usage, and hence the evidence if offered, in such a case, ought to be rejected. It is, doubtless, a question of fact, whether a usage be general, or uniform, or notorious; but its reasonableness, judging from analogy, would seem to be, properly, a question of law; but, as Lord Eldon, in a single case, submitted that question to the determination of the jury, I advance the opinion with necessary hesitation.(a)

§ 65. *The usage must be consistent with the terms of the policy.* We have seen that a valid usage may alter the plain and legal import of the words of the policy, and even vary their settled construc-

(a) Note XX. *Ougier v. Jennings*, (1 *Camp.* 505.) *McGregor v. The Ins. Co. of Philadelphia*, (1 *Wash. C. C. R.* 39.) *Eyre v. Marine Ins. Co.*, (5 *Serg. & Watts*, 116.)

tion; but where the terms in which the usage must be expressed, if introduced into the policy, would be directly and irreconcilably repugnant to an existing clause or provision, the evidence must, doubtless, be rejected, otherwise the policy would be void for uncertainty; or the inconsistent clause, as where written words prevail over the printed, would be excluded from the contract, and, in effect, obliterated. But it is plain that the express words of the contract must always be stronger evidence of the intentions of the parties, than the presumption, arising from a usage, and hence to give effect to those intentions, it is the usage that must be rejected. A usage, therefore, may explain, modify, and control, but cannot contradict the policy; by restriction, or addition, it may qualify the construction of particular words or clauses, but can never be admitted to nullify or expunge them. (a)

Thus, where "goods" were insured "until discharged and safely landed" at the port of destination, evidence that, by the usage of the trade, the risk was to determine at the same time with that on the vessel; namely, when she had been moored twenty-four hours in safety, was properly rejected, as repugnant to the express words of the policy. (b)

§ 66. The preceding observations refer exclu-

(a) Note XXI. *Loraine v. Tomlinson*, (2 *Doug.* 584.) *Blackett v. Roy. Ex. Ass. Co.*, (2 *Crom. & Jarvis*, 244.) *Murray v. Hatch*, (6 *Mass.*, 465.)

(b) *Parkinson v. Collier*. (1 *Park*, 477.) It is evident that the usage, in this case, was not properly a usage of trade, since it could only have been established, by showing the practical interpretation of the policy, in the settlement or rejection of losses. The evidence, otherwise, could only have shown, how, in the opinion of the witnesses, the policy ought to be construed. *Blackett v. Roy. Ex. Assur. Co.* (2 *Crom. & Jarvis*, 244.) Vide Note 22.

sively to those qualities of a usage that are necessary to be proved as evidencing the intention of the parties to adopt it as a part of their contract; but when the usage is liable to the objection next to be stated, it is wholly void, however plainly it may appear, that the parties really meant, to adopt or follow it. The objection has no reference to their intentions.

The usage, as the rule is commonly expressed, *must be consistent with the rules of law*; but these expressions, it will be seen, require to be carefully explained and limited. The proposition is, indeed, laid down, in many cases, in broad and general terms, that a usage, inconsistent with an established rule of commercial law, cannot be admitted in evidence, and is wholly void; yet we have seen, that in many instances, a usage thus inconsistent, when clearly proved, has been allowed to prevail; and the decisions are conclusive, to show that a known and definite rule of law, plainly applicable, is frequently set aside, and the right of the parties *wholly* determined, by a hostile usage. Nor do these decisions involve any violation of principle. They are a necessary consequence of the doctrine that a valid usage is *a part of the contract*. The right of the parties, by a positive stipulation, and within certain limits, to vary or prevent the application of any of the rules of law, by which their rights and liabilities under the contract are defined and governed, is undoubted; and, as a usage, when established and applicable, is held to afford the same evidence of the intentions of the parties, as the express words of their contract, it must necessarily have the same effect. Any and every rule of law, therefore, the

application of which, it is competent to the parties by an express stipulation to vary or prevent, is liable to be affected, to the same extent, by an existing and valid usage. If this distinction be rejected, I know none other, that can reasonably be substituted ; nor upon what other ground the decisions, that have been made, can be vindicated.

Adopting, then, the principle, that every rule that the parties themselves may abandon or change, may be superseded, in like manner, by a usage, the proposition that a usage must be consistent with the rules of law, only means, that it must be so in the same sense as the policy itself. No use and practice, however long continued and invariable, can render valid an insurance that the law prohibits. No usage can legalize an insurance upon a prohibited trade, nor when the policy is a wager in its design and effect, although not in its form. In these, and in all similar cases, the illegality, that the usage seeks to cover, has just the same effect as if it were apparent on the face of the policy ; but every loss that would be recoverable, if embraced by the express terms of the policy, may be rendered so by an appropriate usage.

It is not, however, every usage that will produce this effect. The remarks, that have been made, must be limited to the cases in which the usage springs from a use and practice to which the insurers themselves are parties, and which had its origin, therefore, in their own consent.(a) Where

(a) This observation refers to the whole body of the insurers, and does not necessarily include the defendant in the suit, so as to require explicit proof of some act of his, manifesting his consent to the usage.

the usage offered to be proved is a usage of trade, that, when applicable, governs the construction of the policy, by its mere existence, it must, doubtless, be consistent with the rules of law in the fullest sense of the words, in order to charge the insurers with a loss, that has resulted from its observance, or from which its observance would otherwise have discharged them ; and this is true in all cases in which their consent to bear such losses, is neither expressed in the policy, nor from other circumstances can be justly inferred.

The master of a vessel, in the event of a disaster that breaks up the voyage, has no right to sell the vessel or cargo, unless under circumstances of a stringent necessity that the law has carefully defined. The insurers, therefore, are not bound by an unnecessary sale. It is not considered as a loss from the perils insured against, and, I apprehend, that no usage in our own or in any foreign country, enlarging, in this respect, the discretionary powers of the master, could be adduced to render them liable, unless their consent to assume the risk was otherwise manifested.

§ 67. Hence, when the master of a vessel, wrecked on the coast of Virginia, sold the cargo on the beach, instead of transporting it, as he might have done, and his duty required him to do, to its port of destination, and the offer was made to justify his conduct by proof of the known usage of the place where the loss occurred, the Supreme Court of Massachusetts justly and indignantly rejected the evidence. "Such a usage," the learned judge, who delivered the opinion of the Court, observed, "is of no validity ; it could not have had any law-

ful commencement or continuance ; it was against common faith and honesty. A usage to sell without necessity is of no more validity than a usage that when a vessel takes the ground, the master and crew may turn pirates.”(a)

§ 68. It is to be observed, however, that in this and in all similar cases, the exemption of the insurers from the loss that is claimed, does not rest, solely, on the illegality of the usage. Its true ground is, the absence of the necessary proof of the consent of the insurers to assume the risk. A usage may be certainly illegal and void, as introducing a practice directly forbidden by law, or plainly inconsistent with the rules of a sound morality, or of public policy, and yet the insurers, with their own consent, may well be charged with a loss resulting from its observance, unless the effect of thus charging them would be to give such an interpretation to the policy, as would render the contract itself illegal and void. An illegal usage does not become a part of the contract merely by the consent of the insurers to assume its risk, but it does become a part of the contract, when the effect of the policy is to sanction and encourage a practice which the law condemns ; and in such cases the insurance is, doubtless, void. A policy to indemnify the assured against his own illegal acts, is clearly void, and no evidence of a usage could render it valid, but it is not necessarily void where it merely assumes the risk of the illegal acts of his agents. The insurers may certainly agree to sustain any and every loss that may result from the illegal and unauthorized

(a) *Bryant v. Com. Ins. Co.*, (6 *Pick.* 131.)

of the master, just as by the terms of the policy they are now liable for all his illegal acts that law includes under the name of barratry. They as well agree to sustain the loss occasioned by unnecessary, as by a fraudulent sale, for which, in many cases, they are now responsible. (a) The, which is the conclusion to which these reasons were designed to lead, should it appear that a long continued and invariable practice, an institution, rendering the insurers liable for such a, had been given to the policy, this evidence of the intentions of the parties, I cannot doubt, would have the same effect as an express provision in the policy; but I regard it as equally certain, that even in the case supposed, nor in any similar case, can the consent of the insurers to assume the risk of an illegal usage, be inferred from the mere existence of the usage. These positions, I think, are sustained by the decisions. In the only cases in which the evidence has been admitted to supercede a rule of law, the usage was solely derived from a use and practice between the assurers and assured, and they contain no intimation that in the usage is of a different character, the evidence could be justly received. (b)

59. It has been implied in all the observations

Where the master runs away with the vessel and cargo, and sells for his own benefit, it is an act of barratry, and the insurers must bear it. *Dixon v. Reid*, (5 B. & A. 597.)

Note XXII. *Edie v. The East India Com.*, (2 Burr. 1216.) *v. Barker*, (2 Johns. 328.) *McGregor v. Ins. Co. of Philadelphia*. *v. Wood*, *Long v. Allen*, *Newman v. Cazalet*, *Palmer v. Black-Halsey v. Brown*, (3 Day, 46.) *Renner v. Bank of Colum.*, (9 U. S. 592.) *Jones v. Fales*, (4 Mass. 252.) *Lennox & Kennebeck v. Page*, (9 Mass. 158.) *Stewart v. Aberdeen*, (4 M. & W. 228.)

that have been made, and such is, undoubtedly, the law, that when a valid usage is proved, it is conclusive upon both parties, so that neither is permitted to aver his personal ignorance of its existence, or of its application to the policy ; and this doctrine may possibly suggest a difficulty that it is expedient to notice. If the sole ground of the admission of a usage is its presumed adoption by the parties, why, it may be asked, may not this presumption be repelled, by showing that the usage was, in fact, unknown to the party against whom it is alleged, or was not meant by him to govern the contract ? The reply is, that the evidence is excluded, precisely, for the same reasons, that neither party is permitted to aver his own ignorance of the obvious meaning, or legal import, of the words of the policy. When the one party considered the usage, and, from its nature, had a right to consider it, as a *part of the contract*, it would be quite as unjust to permit the other, to rescind or alter that contract, by the allegation of his own ignorance or mistake, as to permit a similar allegation in regard to the policy itself. In neither case is the ignorance, or the mistake, such as the law excuses.

§ 70. But although neither party can aver his own ignorance of the usage as against the other, its presumed adoption, as the basis of their contract, may, doubtless, be repelled by evidence, that, by their mutual understanding and agreement, it was not to be followed or applied. By such evidence, the presumption that the usage was a part of the contract in the intention of the parties, would be effectually met and destroyed ; and, as this presumption arises wholly from extrinsic and oral

proof, it is a necessary consequence that by similar proof it may be repelled.(a)

§ 71. Between the several kinds of usage that I have attempted to distinguish, there exists a general resemblance, by which they are comprehended in the same name, that has led to their frequent confusion ; yet they are, in truth, widely different, not only in their origin, nature, and extent, but in the mode of their application to the construction of the policy ; and hence it seemed to be necessary, that the rules, applicable to each, as well as those applicable to all, should be distinctly and accurately stated. The exposition that has been given of these rules, and of the reasons on which they are founded, if such as I have labored to make it, will furnish the means by which the validity of a usage, as controlling the interpretation of the policy, the propriety of admitting evidence to establish its existence, the nature of the evidence to be received, and its sufficiency when given, may, in all cases, be readily determined.

§ 72. I shall close this long, but, I trust, not fruitless discussion, by a few observations, that I deem of some practical importance.

It is a necessary result of an attentive consideration of the essential qualities of a valid usage, that, when the evidence is conflicting and various, the usage can seldom, with justice, be admitted, or established ; and it will appear upon further consideration, that, in many such cases, where the witnesses are admitted to be equally credible, and the

(a) Starkie on Evid. Part IV. 1039, and cases there cited, vide post, vol. 2, Lec. on Representations, where this question is fully discussed.

facts proved by all, to be equally true, the question of the existence of the usage, unless under special instructions, ought not to be submitted, at all, to the decision of the jury. A usage, clothed with all the attributes that the law requires, generally, if not universally, is a conclusion from the evidence, not its immediate subject. The acts, by the number and succession of which the usage is created, are the proper subject of direct proof; the existence of the usage, of inference, merely. Hence, when witnesses are produced on both sides, and the facts sworn to by all, are admitted to be true, the evidence is not contradictory, in the proper sense of the term, and, therefore, necessary to be submitted to the jury; but the only real question that it raises, is, in its own nature, a question of law. The instances of the observance of the usage, that are proved by the witnesses called to support it, may be so repeated and numerous, as fully to justify the belief of its legal existence; yet, admitting all these instances to have occurred, the conclusion drawn from them, may be wholly erroneous, and the facts proved by the opposing witnesses, even when much fewer in number, may yet be conclusive, to show, that the pretended usage is neither *general*, *uniform*, or *notorious*. Now the generality, the uniformity, and the notoriety of a usage, when the facts are undisputed, or admitted, are certainly questions of law ;(a) and, hence,

(a) It is not meant that there are questions of law in all cases where the *facts* are undisputed; for in many it may still be the province and duty of the jury to *draw* the necessary conclusion; but whether the evidence be sufficient of itself to prove or disprove the existence of a *valid usage* is always a question of law, in respect to which it is the duty of the jury to follow entirely the instructions of the judge.

the intelligent judge, in the case I have supposed, instead of submitting the cause to the jury, as one of contradictory evidence, upon the force and effect of which, they alone have the right to decide, will instruct them positively, that, if they believe the facts, stated by the witnesses against the usage, they must find, that it has not been established.(a)

Whether evidence of a usage ought to be received in any case, except where the construction, or the law is doubtful, is a question, that, at the present day, cannot properly be discussed. The law and the practice are established, and it would be dangerous to attempt an innovation. In nearly every insurance that is now made, there is a distinct reference, in the minds of the parties, to the operation of usage upon the construction and effect of the policy. Hence, the entire exclusion of the evidence, would frequently defeat the intentions of the parties, and lead to great and certain injustice. On the other hand, there is, always, danger, when the evidence is admitted, that it may lead to the substitution of a new contract, not only different from that which the policy expresses, but from any, in the contemplation of the parties; thus, in the result, charging the insurers with a loss for which it was never meant they should be responsible. The honesty and intelligence of the presiding judge are the sole protection of the insurers, against the

(a) It is a striking confirmation of the truth of these remarks, that in all, or nearly all, the reported cases in the English books, in which a usage has been established, there was no variation or conflict in the evidence. The reader may verify this observation by examining the cases cited in Notes 10, 11, 12, and 14.

hazard of this injustice, and this hazard, by a due vigilance on his part, in the admission of the evidence, and a firm application of the rules that determine its sufficiency, it is in his power to exclude. The hazard will hardly be found to exist, when the jury are properly instructed, as to the essential requisites of a valid usage, and the nature of the evidence, upon which, alone, it can properly be established ; but when the question is left to their uninstructed and uncontrolled discretion, the existence of the usage, when *necessary to charge the insurers*, however incomplete and unsatisfactory the evidence given, as a general rule, is certain to be found. I repeat, therefore, as an appropriate conclusion to these observations, the emphatic remark of a judge of large experience and eminent ability, that “the evidence of a usage is always to be admitted with a cautious reluctance, and to be watched, in its progress, with a scrupulous jealousy.”

§ 73. The subject of the admission of the evidence of extrinsic facts, unconnected with a usage, to determine the words of a policy to a peculiar meaning, distinct from their popular sense, but in the particular case, plainly intended by the parties, will not long detain us.

It has already been stated, as a general rule of construction, that the words of the policy, are to be understood in their general and ordinary sense, unless it appears from the context, that in order to give effect to the immediate intentions of the parties, they must be understood in a distinct and peculiar sense. When the necessity of thus understanding particular words, although not apparent from the context, is rendered evident by extrinsic

facts, it must equally be obeyed in the construction we adopt.

§ 74. Thus, the word "port," in its general and ordinary sense, is equivalent to harbor. It means a space of water, so enclosed by the land, as to be safe from the perils of the ocean. But when it appeared in evidence, that a place to which the vessel under the terms of the policy was authorized to proceed, was an exposed and open roadsted, although designated in the policy as a port, the ordinary meaning of the word was very properly rejected, and the peculiar sense adopted, which was plainly necessary to give effect to the intentions of the parties.(a)

§ 75. The third general class of the cases in which parol evidence may be received to vary and control the interpretation of the policy, bears very little analogy to the preceding, and, I fear, must be regarded, as, in a measure, anomalous. In the preceding, the construction of the policy, although varied by the evidence, yet proceeds upon general reasons, that equally apply to all other policies, upon similar voyages, or embracing similar risks. In the present, the evidence bears a single relation to the individual contract; nor can it be denied, that, in many cases, its effect is, to substitute in place of the agreement that the policy expresses, a new contract, founded solely on the verbal communications of the parties.

(a) Note XXIII. *De Longuemere v. N. Y. F. Ins. Co.*, (10 *Johns.* 12.) *Hancox v. Fishing Ins. Co.*, (3 *Sumn.* 134.) *Neilson v. De La Cour*, (2 *Esp.* 619; 1 *Green.* 534.) *Brch v. Depeyster*, (4 *Camp.* 385.) *Gray v. Harper*, (1 *Story*, 574.) *Taylor v. Briggs*, (2 *Carr. & Payn.* 525.) *Etches v. Aldan*, (1 *Man. & Ry.* 157.)

The proper construction of the policy very often depends upon the communications, relative to material facts, made by the assured, or his agent, prior to its execution ; and in all such cases, where the representation is not embodied in the policy, which rarely happens, it must necessarily be established by extrinsic proof. The representations of the assured, constitute of themselves a large and difficult subject, that will hereafter require to be separately treated, and I, therefore, abstain from the present discussion of the question, whether the admission in these cases of extrinsic proof, to the extent, it is, in fact, received, can be reconciled with the general rules of evidence, the laws and practice of other nations, or the dictates of a sound policy.

PROOFS AND ILLUSTRATIONS.

NOTE XVI.

P. 253, § 52. It appears, from several cases, that it was the practice of Lord Mansfield to consult the jury, which was then almost invariably special, and composed of merchants, as to the construction of the policy and the rules to be applied in the settlement of a loss. Thus in *Bean v. Stupart*, (*Doug.* 12,) in which the principal question was, whether the word "seamen," as used in the warranty in the policy, extended to and included "boys," and in which no witnesses appear to have been examined to show the interpretation of the word by usage; his lordship not only consulted the jury as to the true meaning of the word, as used in the policy, but actually left the question of construction to their determination. The jury found by their verdict, that the word was to be construed, as including "boys," and on the argument of a motion for a new trial, Lord Mansfield said, "The special jury and the by-standers were clear," (i. e. that this was the true construction,) "they hardly seemed to think it a serious question." The course here pursued is the more remarkable, as in a previous case, (*Pawson v. Ewer, Cow.* 787,) the court had given the same construction to the words. So in *Eden v. Parkinson*, (*Doug.* 732,) where the case turned solely on the proper construction of a warranty of neutrality. Lord Mansfield said, that "He had no doubt on the trial, and he knew that *the jury had none*;" he must, therefore, have ascertained their opinion by inquiry. So in *Bermond v. Woodbridge*, (*Doug.* 783,) his lordship, in the first instance, took the opinion of the jury

upon a pure question of law, whether there ought to be a return of premium. Many other similar instances of the deference paid by Lord Mansfield to the opinions of the jury upon questions that it belonged only to the court to decide, will be found in Burrow. Vide *Gardner v. Croasdale*, (2 Burr. 906.) *Lewis v. Rucker*, (2 Burr. 1168.)

NOTE XVII.

P. 261, § 56. Mr. Marshall says, "Evidence of a few instances is not sufficient to establish such a usage—(i. e. a usage of trade.) It can only be supported by a long and uniform practice. Therefore, if a ship in a voyage from Liverpool to Jamaica, put into the Isle of Man, and some instances appear of ships in this voyage putting in there, but no regular or settled practice of doing so, be shown, this will not excuse the deviation, but the insurers will be discharged. (*Marsh.* p. 186.) He omits the name of the case to which he refers, but it is doubtless that of *Salisbury v. Townson*, which is briefly stated by Mr. Millar, (*Millar on Ins.*, 418;) vide also, 2 *Park*, (*Hild. ed.*) 647.

In *Cutter v. Powell*, (6 Term, 320,) the court directed inquiries to be made relative to the usage of the commercial world in the construction of an agreement concerning the wages of seamen, and instances were adduced as having happened within two years previous to the trial, in which merchants at Liverpool had paid the wages upon the construction for which the plaintiff contended. Lord Kenyon and the court held that the instances were too few and recent to form any thing like an usage.

Martin v. Del. Ins. Co. (2 Wash. C. C. R. 254.) The policy, as construed by the court, covered the vessel on a direct voyage from Coro to Jamaica; but the vessel, leaving the usual course of the voyage, stopped for two days at Aruba, and the question was whether this was a deviation discharging the insurer. It was attempted to excuse it upon the ground of usage, and one of the jury swore that he had known two instances of vessels on a voyage to Coro stopping at Aruba to take on board a supercargo, and that this was the course of the trade, and that such vessels were per-

mitted to call at Aruba on their return voyage, in order to land the supercargo ; but Mr. J. Washington, in his charge to the jury, said, " The evidence is very far from proving a usage of trade ; twenty instances may have occurred of vessels not otherwise provided with persons acquainted with the traffic of mules on the main, calling at Aruba, in order to procure such a person, and as many instances may have occurred of vessels proceeding directly to Coro, relying upon finding such a character there. But this is no proof of a usage. It should appear that this course is *uniformly* pursued, and that it should be known as well to the underwriters as to the insured. The former must take notice of the usage of trade, but then it must be *uniform* and *fixed*."

In the case of *Collings v. Hope*, (4 Wash. C. C. R. 149,) where the defence rested on a usage, but the evidence was contradictory, the same eminent judge defined the necessary conditions of a usage in these words : " What is called the custom or usage of trade, is the law of that trade : and to make it at all obligatory, it must be ancient, (sufficiently so, at least, to be generally known,) certain, uniform, and reasonable. A usage, if so doubtful as to be known only to a few, and where merchants engaged in the same trade differ, as they do in this case, as to its existence, can never be regarded."

In *Trott v. Wood*, (1 Gall. 443,) in which one of the questions was whether the transshipment of goods, by the master of a vessel, was justified by a usage of trade, Story, J., said, " As to the question of usage, in order to support that defence, it was not sufficient that a few instances could be produced in which masters had transhipped goods and no objection had been made. The course of the trade must be uniform and general to enable it to be considered as a legal defence. It should be so well settled, that persons engaged in the trade must be considered as contracting with reference to the usage ; and as the proof of such usage lay upon the defendant, the jury ought not to change the general principles of the law, as to the rights of the parties, unless the usage were fully proved to be uniform, and independent of the consent of particular shippers."

Crosby v. Fitch, (12 Conn. R. 422.) The action was

brought by the owner of goods, shipped from New-York for Norwich, in Connecticut, against the owner of the vessel, for a loss occasioned by the perils of the sea; and the ground of the action was, that the vessel had departed from the usual and proper course of the voyage by taking the outside passage round Long Island, instead of going through the Sound. This proceeding was attempted to be justified, both as necessary and as warranted by usage; but the court were of opinion, that on both grounds the defence wholly failed. In delivering the judgment of the court, Church, J., said, "Freighters and insurers, in all their commercial transactions, are presumed to act and contract in reference to known and general usage, and to submit to it, and such general usage may be well enough said to become a part of all their contracts; and if without consent, a partial practice is substituted as governing a voyage or other commercial operation, it operates as interposing a new contract, not agreed to by the parties, and perhaps as a fraud; indeed, usage is not to be regarded at all, unless it be of such a character as may be supposed to influence parties, and none can be ordinarily presumed to do this but such as is public and continued; and therefore it is not sufficient to prove a few instances, not amounting to a general practice, as an excuse of what would otherwise have been a deviation."

NOTE XVIII.

P. 263, § 57. *Gabay v. Lloyd*, (3 Bing. 793.) The insurance was upon horses, warranted free from jettison and mortality. During a storm, the horses, in their terror, broke down the partitions by which they were separated, and bruised and wounded each other so much, that they all died. It was held, that this was a loss by the perils of the sea, and the principal question was, whether the right of the plaintiffs to recover was affected by the finding of the jury, that by the usage at Lloyd's, (where the insurance was effected,) the underwriters were not liable, under such a policy,

for the loss that was claimed. The counsel for the plaintiffs insisted, that, as the usage found, was confined to the underwriters in the habit of subscribing policies at Lloyd's Coffee House, and the merchants and others effecting policies there, it was insufficient to bind the plaintiffs, it not being found, that they were in the habit of effecting insurances at Lloyd's; consequently, there was nothing to show that they had any knowledge of the usage; and the court were all of opinion, that the usage, as found, was not sufficient, "inasmuch as it was not found to be the general usage of the whole trade, in the city of London, but only in the house where policies were usually effected by private individuals. If there had been any evidence to show that the plaintiffs were in the habit of effecting policies at Lloyd's Coffee House, the jury ought to have found, that they had knowledge of the usage which prevailed there. A court of law does not know what proportion of the policies effected are effected at Lloyd's Coffee House, and even if that had been found, it would only be evidence of the usage in London, and the jury ought to have found the fact of an existing usage; here there was no usage found sufficient to bind the plaintiff." The rule for a new trial was refused. The language of the court in this case, implying, as it evidently does, that proof of the usage in *London*, would not be sufficient evidence of a *general* usage, corresponds with the doctrine in the text.

Palmer v. Blackburne, (1 Bing. 61.) The policy was an open policy on freight, and, although it is not so expressly stated in the report, it is a necessary inference, that it was effected at Lloyd's Coffee House. The question was, whether the plaintiffs were entitled to recover the whole amount of the freight stipulated to be paid to them, or whether seamen's wages, and other necessary expenses, were to be deducted; in other words, whether they should recover the gross, or the net freight. To prove their right to recover the whole amount, the plaintiffs called several merchants of thirty and forty years experience at Lloyd's, who concurred in stating, that, though open policies on freight were extremely rare, the uniform custom in settling losses upon them had been, to pay the assured the amount of the

gross freight. The evidence was objected to, but received, and the defendant then called witnesses nearly equal in numbers and experience, who stated, that they were not aware of the existence of the usage; it does not appear, however, that they knew of any instances or instance in which a loss had been settled upon a different rule; their testimony was, therefore, strictly negative. The plaintiffs obtained a verdict, and upon the argument of a motion for a rule to set it aside, Dallas, C. J., said—"The evidence in support of the usage was as strong as possible. The evidence on the part of the defendant only of a very loose character, and I put it to the jury to consider, whether the usage was so notorious as to imply a knowledge of it in the parties to the action, and so to form a part of their contract." Upon another question, however, raised by the counsel for the defendant, namely, whether a usage, thus contrary to the very principle of a policy of insurance, as a contract of indemnity, ought to be supported, the Chief Justice expressed doubts, and thought it worthy of further consideration. Park, J., thought the evidence had been properly admitted, and if admissible, that there was no ground for a new trial. "The jury," (he added,) "would have drawn a very wrong conclusion, if they had found there was no such usage. They have found, that, open policies on freight have always been settled in this manner, and my experience entirely coincides with that finding." Burrough, J., concurred with him, and a rule was refused.

This case, as the usage at Lloyd's was permitted to control the policy, may be thought to contradict *Gabay v. Lloyd*, but it must be observed that, the defendant was himself an underwriter at Lloyd's, and, therefore, chargeable with notice of the usage. The doubts expressed by C. J. Dallas, as to the propriety of supporting the usage, would seem not unreasonable, were it not that a valued policy, covering the gross freight, is certainly valid; and hence there is little ground to complain of a usage that merely leads to the same result. It is, however, deeply to be regretted that the salutary principle, that the recovery of the assured should, in all cases, be limited to an indemnity, has, in so many instances, been violated or forgotten; indeed, by the construction,

given to valued policies, it is nearly subverted. In many cases, they are essentially wagers.^(a) Mr. Phillips has made some observations on this case that are worthy of consideration. The evidence on the part of the defendant, he insists, although negative, was sufficient to disprove the notoriety of the usage. It is, however, probable that this evidence is stated too strongly in the report, as the Chief Justice remarked, that, "it was very loose;" and he submitted the question of notoriety distinctly to the jury. (2 *Phil.* 734.)

In *Vallance v. Dewar*, (Note XV.) *Ougier v. Jennings*, (Note XX.) and *Kingston v. Knibbs*, (Note XV.) the principal question was, whether the intention to follow the usage ought to have been communicated to the underwriters, it being admitted by all, that the usage, although not general or uniform, if communicated, would have bound the insurers.

The most recent case, to show that a local usage is only binding on those who by positive evidence are charged with a knowledge of its existence, is that of *Bartlett v. Pentland*, (10 *B. & Cress.* 760.) The plaintiffs, the assured, who resided at Plymouth, had employed an insurance broker in London to recover a loss from the underwriters, and the latter adjusted the loss by setting off in account against it, a debt due to them from the broker for premiums, and it was proved to be the custom at Lloyd's to consider such set-off between the broker and underwriter as a legal payment. The broker became bankrupt, and never paid over to the assured the monies he had received. The assured brought this action to recover the loss of the underwriters, on the ground that they were not bound by the set-off as an actual payment; and a material question in the cause was, whether, on the supposition that the supposed payment was not valid

(a) In *Lucena v. Crawford*, (2 *New R.* 322,) Lord Eldon says, "There is some strange language to be found in our books, respecting wagering and valued policies, the latter of which, though frequently in effect *wagering* policies, have been permitted, because it has been supposed that the convenience of them is greater than would result from the prohibition."

in law, it was rendered so by the usage proved. On this question, Lord Tenterden, in delivering his opinion, said—“As to the supposed usage at Lloyd’s, the usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with the usage, and adopt it. Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiffs.” In this opinion Bayley, J., and Littledale, J., concurred. *Russell v. Bangley*, (4 B. & A. 398,) and *Scott v. Irving*, (1 B. & A. 605,) proceeded on the same ground, that the assured was not bound by a particular usage, unless there was proof of his actual knowledge and assent.

The following remarks of the author of a series of very able essays, in the London Law Magazine, on Mercantile Law, appear to me so judicious, that I feel it a duty to transcribe them. After stating, as the received rule, that parol evidence of a usage may be admitted to explain the policy and restrict or enlarge its interpretation, he adds—“But this proposition, though in itself true, seems to have been received with too little qualification, or, at all events, in its application, at one time, to have been pressed to an unreasonable extent. The present inclination of the courts, is to confine it within stricter and more legitimate bounds; and it must now be taken with the following limitations:—1. Usage is not admissible for introducing qualifications and conditions inconsistent with the language, and general import of the contract. Nor, 2. To control a positive rule or principle of law.(a) 3. It must either be a usage known and received among merchants generally; or, if set up as the usage of a particular body or trade, it must appear by evidence that the party to be affected by it had, or from the course of his dealings may be fairly presumed to have had, cognizance of its existence. We have thought it right to advert to this point

(a) The modifications to which this position is subject, are stated in the text, (§ 66, p. 268.)

particularly, because it is in insurance cases, more especially, that the latitudinarian error which we have noticed, seems to have been prevalent. There was indeed a time, (nor is it quite certain that we are justified, even yet, in using the past tense,) when the courts strained their ingenuity to uphold the claim of the assured against objections of the underwriters, though on what sound principle a different rule, or measure of interpretation, should be applied to a contract of insurance, than to any other contract, is not, perhaps, easy to discover." (*London Law Magazine*, vol. 18, p. 308.)

NOTE XIX.

P. 265, § 58. *Planché v. Fletcher*, (*Doug.* 251.) This was an insurance on goods from London to Nantz, with liberty to touch at Ostend. The vessel cleared out for Ostend alone, but without any intention of going there, and, in fact, sailed directly for Nantz. It was insisted that this was a fraud on the underwriters, who, by the false clearance, were misled as to the true destination of the vessel. The reply was, that the course pursued was justified by the usage of the trade, and the plaintiffs produced evidence to show that *all* ships going with goods of British manufacture for France, cleared out for Ostend, without meaning to go thither, and that this was *universally understood by persons concerned in that branch of commerce*. The plaintiffs obtained a verdict, and Lord Mansfield, in delivering the judgment of the court, discharging a rule to set aside the verdict, said—"It is said there was a fraud upon the underwriters, in clearing out the ship for Ostend, when she was never intended to go thither, but I think there was no fraud upon them—perhaps not upon any body. What had been practised in this case, was proved to be the *constant course* of the trade, and *notoriously* so to every body."

In *Long v. Allen*, (*Sup. Note 14*,) where the usage had the effect to set aside a definite rule of law, it was expressly found to be "universal." So in *Newman v. Cazalet*, (*Sup.*

Note 14,) the usage relied on, appears to have been followed in all the cases that had occurred.

In *Power v. Whitmore*, (4 M. & S. 150,) where a principal question was, whether the decree of a court at Lisbon was *per se*, sufficient evidence of the usage of that port in the settlement of a general average, Lord Ellenborough distinctly admits the necessity of such a usage being "invariable" in order to bind the insurers. His language is—"Now without pronouncing what might have been the effect of a statement in this case, (if it had contained such,) that it was the *known* and *invariable* usage amongst merchants at Lisbon, the port of discharge, to treat losses and expenses of the kind and description, which are specified in the case as the subjects of general average, we cannot but observe, that the case contains no allegation of fact whatsoever upon this head, but merely states a decree of a court at Lisbon, which proceeds upon the assumption of this supposed fact as its foundation." The court held this to be insufficient as a proof of the necessary usage. Vide also Note 17, *Martin v. Del. Ins. Co.*, (2 Wash. C. C. R. 254, *Trott v. Wood*, (1 Gall. 443,) and *Crosby v. Fitch*, (12 Conn. 422.)

NOTE XX.

P. 269, § 64. *Ougier v. Jennings*, (1 Camp. 505, *in note*.) "Action on a policy of insurance on fish, by the ship *Duchess of Gordon*, at and from Newfoundland, to a port in Portugal. The ship carried out a cargo of salt from Lisbon, with which she arrived at Newfoundland on the 21st July. As soon as she was unloaded, she proceeded in ballast to Sydney, where she arrived on the 25th August, and took in a cargo of coals. This she carried back to Newfoundland, and delivered there in the beginning of October. Between the 21st of that month, and the 8th of November, she was loaded with the cargo of fish, which was the subject of the insurance, and soon after sailed with convoy for Oporto, but

was totally lost in the course of the voyage. The defence was, that the trip to Sidney had not been communicated to the underwriters, although a material circumstance as tending to retard the voyage insured, and to increase the risk. The plaintiff relied upon the usage of the trade, which was proved by several witnesses.

"Lord Eldon—The policy is, 'at and from Newfoundland to Portugal, upon goods, beginning the adventure from the *loading thereof*.' It is not from the arrival of the ship, but from her beginning to load. I think the practice of the trade in this case, is as capable of being received in evidence, as the practice in other cases in which it has been admitted. This is like the case of the ship that was employed on the Labrador coast, where she fished after her arrival, and before her outward cargo was discharged.(a) There is no doubt, that the policy *prima facie* means the first cargo which shall be laden after the ship's arrival, but the underwriter must refer himself to the usage of the trade, which he is bound to know. The first question will be, whether there is such a usage here? If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is *too dangerous for you to give it effect*. If several ships belonging to a merchant, arrive together at Newfoundland, and finding cargoes for some only, he *bona fide* sends the rest on an intermediate voyage, it seems reasonable; though studiously sending a ship on an intermediate voyage out of her turn would be a deviation. The second question, is whether the ship has been employed otherwise than the usage warrants? If you think the usage does exist, if you think it reasonable, and if you think this ship acted *bona fide* in taking the intermediate voyage, you will find for the plaintiff,—if not, you will find for the defendant."

The jury found a verdict for the plaintiff, and no attempt was made to set it aside.

McGregor v. The Ins. Co. of Philadelphia, (1 Wash.

(a) *Noble v. Kennoway*, *ante* Note XII.

C. C. R. 391.) The claim was for a total loss upon freight, on an open policy, and the controversy related solely to the mode of adjusting the loss. It was insisted by the defendants, that by the usage of Philadelphia, they were entitled to deduct one third from the gross amount of the freight, as it appeared by the freight list, and that the residue, with the addition of 5 per cent to cover premium and commissions, constituted the net freight, for which alone they were liable. Upon this computation, they had paid a sum into court which was sufficient to cover the loss. Mr. J. Washington, however, was of opinion, that "the rule proposed, was unequal and unreasonable, because, the same deduction being being made from the gross freight, whether the voyage was long or short, the indemnity in two cases, exactly alike, except as to the length of the voyage, might be complete in the one case, and fall very far short of being so in the other." The propriety of the decision of the learned judge in this case in the rejection of the usage, as furnishing the rule proper to be followed, seems very questionable. The rule, it is true, was unequal, but could hardly be thought so unreasonable, as to be wholly inconsistent with the presumption, that it was meant to be followed; nor are the other grounds of the decision, as stated in the case, apparently more tenable. The evidence, as to the existence of the usage was perfectly conclusive. It was proved by many and uncontradicted witnesses, that it had been the uniform and invariable practice of all the insurance companies, and of all the private underwriters in Philadelphia, for a period of more than twenty years previous to the trial, and during that long period had governed the settlement of all losses; and that, by such a usage, a rule for the settlement of losses upon freight policies may be established, different from that which the law prescribes, the cases of *Gabay v. Lloyd* and *Palmer v. Blackburne* clearly show. The learned judge, indeed admitted that the assured, if notice of the usage had been given to him, or such notice could fairly have been presumed, would have been bound by it; but surely upon principle, and according to all previous decisions, a practice so long continued, uniform, and invariable, was a sufficient ground for this presumption. Of such a usage, the assured, from its

nature, was bound to know the existence. The assured is certainly as much bound to know what is the interpretation of the policy, as settled by the usage of the place where he effects his insurance, as the insurer, the course and usages of the voyage and trade, that he insures. Had the usage been local, or confined to the office in which the insurance was made, the case would have been different; express notice would then have been necessary: but the usage was general; it embraced, and had always embraced, all the underwriters, corporate and private, and might, therefore, well have been regarded as the law of the state in which it prevailed; consequently, every person effecting an insurance within the jurisdiction of the state was bound to take notice of it.

The text refers to the case of *Eyre v. The Mar. Ins. Co.* (6 *Wheat.* 249,) which has previously been cited, (*Sup.* p. 164, Note V.) and in which the Supreme Court of Pennsylvania very properly rejected as unreasonable, a construction of a clause in a time policy that would have given an election to the assured to continue the insurance in force for an unlimited period—yet, the same court subsequently (5 *Serg. & Watts*, 116,) granted a new trial in the same case for the purpose of letting in evidence of a usage at variance with the construction which they had adopted. The usage, however, as offered to be proved, was not that the insurance might be retained and continued for an *unlimited* time, but merely until the termination of the voyage in which the vessel might happen to be engaged when the policy expired. It seems, therefore, to have been free from the objection intimated in the text. In delivering the opinion of the court, admitting the evidence, Sergeant, J., said, “The plaintiff offers to prove that the voyage insured is known by the name of a trading voyage, and that by the usage of trade, the vessel might sail to any port of the globe to which she can get a freight, at any time, during the twelve months, and continues covered by the policy during such voyage, and that such usage was *well known to, and acted on by the underwriters of this port*. We are not able to distinguish the case from the numerous cases decided, in which proof of such a usage has been admitted to vary and control

the language used in the policy, and to give a construction different from that which it otherwise would have received, or did receive." The reader will not fail to observe how entirely the language of the learned judge corresponds with the doctrine of the text, that a usage may set aside, not only the plain import, but the judicial construction of the words or clause to which it applies. Yet, his language involves the not unfrequent error of confounding a usage of trade, and a usage in the *interpretation* of the policy. Certainly the usage offered to be proved could not have been established in any other manner than by showing that it had been followed by the insurers in the settlement of losses; otherwise, it would only have shown, not what the *usage* was, but what the *understanding*; that is, the opinion of the witnesses themselves, and what they knew, or believed to be, the opinion of others.

Nor is it easy to understand what is meant by the "voyage insured," under a general time policy, or by evidence that such voyage is known "as a trading voyage." Such a policy has no reference to any particular voyage, or kind of voyage; but necessarily includes every voyage, whatever may be its nature, in which the owner may choose to employ the vessel. Evidence, therefore, founded on a usage, that a particular voyage, or kind of voyage, was in the contemplation of the parties, if intended to limit the insurance to the voyage, or kind of voyage, described, ought plainly to be rejected, as inconsistent with the nature of the contract. The usage would contradict the policy. Indeed, the whole offer of the plaintiff, in this case, would have been improper and immaterial, had it not closed with the allegation, that the pretended usage "was well known to and acted upon by the insurers." This addition changed wholly the character of the usage, and made it admissible.

NOTE XXI.

P. 270, § 65. *Loraine v. Tomlinson*, (2 Doug. 584.) The assured, in this case, claimed a return of a part of the premium, upon the ground, that the risks were divisible,

and had not been fully incurred ; and he attempted to prove that by usage, a portion of the premium was to be returned in similar cases. The court, in giving judgment, laid no stress upon this evidence, and Lord Mansfield is reported to have said, "This is a mere question of construction upon the face of the instrument, and, therefore, parol evidence should not have been admitted to explain it," which is, in effect, saying that parol evidence of a usage can never be admitted, even to *explain* a policy. It appears, however, from a note of the reporter to the subsequent case of *Long v. Allen*, (4 *Doug.* 277,) in which evidence of a usage relative to a return of premium was admitted and prevailed, that in *Lorraine v. Tomlinson*, nothing resembling a usage was, in fact, proved. It was entirely uncertain what portion of the premium was usually returned, and whether, in all cases, a return was made. There was no definite and uniform practice ; and it was upon this ground that the evidence was disregarded. This is a striking instance of the danger of being misled by the remarks of eminent judges, when the facts of the case are imperfectly reported. This observation of Lord Mansfield, inconsistent as it is with his own decisions and with *all* the decisions on the subject of usage, has been quoted to show that the court will not "go out of the policy for evidence as to its construction," (2 *Phil.* 730.) Looking at the words of the policy in *Lorraine v. Tomlinson*,) what Lord Mansfield, doubtless, meant to say and did say, was that the intent of the parties upon the face of the policy, was too clear, to be affected by such evidence as had been given.

Blackett v. Royal Exch. Assur. Co. (2 *Cro. & J.* 244.)

One of the questions in this cause was, whether parol evidence of a usage was admissible to show that the underwriters never paid for the loss of boats upon the outside of the ship, slung upon the quarter. Upon this question, Lord Lyndhurst, C. B., in delivering the judgment of the court, said, "The policy is in the usual form as to ship and goods, and as far as regards the ship, imports to be upon the ship, (that is, the body,) tackle, apparel, ordnance, munition boats, and other furniture ; there is no exception, and the policy is, therefore, upon the face of it, upon the whole ship,

on all her furniture, and on all her apparel. It was in evidence in the cause, and admitted upon the argument, that upon such voyages as that insured, ships invariably carry a boat in the place in which this boat was carried, and slung, as this boat was slung, and that the ship would not be properly furnished or equipped, unless it had a boat in that place, and so slung. The objection, then, to the parol evidence, is, that it was not to explain any ambiguous words in the policy, any words which might admit of doubt, nor to introduce matter upon which the policy was silent; but was at direct variance with the words of the policy, and in plain opposition to the language it used. That whereas the policy imported to be upon the ship, furniture, and apparel, generally, the usage is to say that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." Upon these grounds, the evidence was rejected. Although the judgment of the court in this case seems to proceed solely upon the ground that the usage offered to be proved contradicted the words of the policy, it is yet evident, that the usage actually proved on the part of the assured, that it was the invariable custom of vessels in such voyages as that insured, to carry their boats on the outside, was material to the decision. Had an opposite usage been shown—had it appeared that it was the general custom of vessels in the same trade to carry their boats upon deck, and that they were in fact much safer in that position, a usage, exempting the underwriters from the loss, when the boat was carried in an unusual and dangerous manner, might clearly have been admitted in evidence. There would then have been an entire analogy between the case, and those in which the usage exempts the underwriters from the payment of losses upon goods lashed upon deck, from which Lord Lyndhurst, in a subsequent part of his opinion, is careful to distinguish it; since this partial exemption of the underwriters would merely have qualified, not have contradicted, the words of the policy; but as it appeared that in the trade insured, all boats were carried on the outside, to exempt the under-

writers from the loss was to render the insurance upon the boat wholly void—and this involved a plain contradiction.

In *Murray v. Hatch*, (6 Mass. 465,) where the policy was against “a total loss only,” evidence was offered, that when the insurance was effected, the parties agreed that it should only apply to a total loss in the natural sense of the words; so that if any part of the vessel and cargo were saved, the underwriters should not be liable. It was held that the evidence was inadmissible; but the court intimated a very clear opinion, that if, by a settled practice, that interpretation had been given to the policy, the evidence of the usage must have been received. (*Sewall, J.*, p. 477.) This case well illustrates the important distinction, which is sometimes forgotten, between the effect of a parol agreement of the parties to the individual contract, and a general usage, and shows that the latter is not to be regarded as contradicting the terms, or varying the construction of the policy in the same cases as the former. As stated in the text, the repugnancy between the policy and the usage must be absolute and incurable. Vide also, *N. Y. Gas Light Co. v. Mech. Fire Ins. Co.* (2 Hall. Sup. C.R. 108,) *Mellen v. Nat. Ins. Co.* (1 Hall, 452,) *Levy v. Merrill*, (4 Greenleaf, 180.)

It is stated by Mr. Phillips,^(a) that in the case of *Crofts v. Marshall*, (7 Carr. & Payn. 597,) it was ruled by Lord Denman, that a practice at Lloyd’s by which the particular loss claimed would not have been attributed to the “perils of the sea,” could not be given in evidence to vary the legal construction of the policy, and certainly, the observations of his lordship, in his address to the jury, seem justly to bear this interpretation; but upon examining the report of the case, it appears that no evidence whatever, of the usage at Lloyd’s was given or offered. There is, therefore, apparently some error in the remarks attributed to Lord Denman, especially as it seems impossible to justify the opinion they seem intended to convey. It would be difficult to assign a reason why the general words “perils of the sea,” may not as well be restricted by a known and definite usage, as the general words “goods,” “corn,” or “roots.” There are, perhaps,

(a) 2 Phill. 734.

no terms in the policy, not only more general, but more loose and indeterminate than "*perils of the sea*," and this, Lord Denman distinctly admits. Judging from the facts of the case, his lordship may have said that the rule, alleged to be followed at Lloyd's, had its existence been proved, being merely a local usage, was not binding on the defendant, since no such usage, if not general, could alter the legal interpretation of the policy, unless it appeared from other evidence, that the contract was made in reference to its existence. If so, his lordship's decision was meant to conform to that in *Gabay v. Lloyd*.

The case of *Turner v. Burrows*, (5 *Wend.* 541, in error, 8 *Wend.* 144,) seems to be cited by Mr. Phillips^(a) as one in which evidence of a usage was rejected, as inconsistent with the terms of the policy. The policy, in this case, purported to be made by S. E. Burrows, the defendant, "*on account of ———*," and this blank had not been filled up. The claim of the plaintiff was founded on the allegation, that the policy was intended to cover his interest, as well as that of the defendant, who had received from the underwriters, in payment of a loss, the whole sum insured; and to show that this construction might justly be given to the policy, he offered on the trial, to prove that it is a common usage for insurance companies to underwrite policies in blank, similar to the policy given in evidence, and that the universal understanding of the companies, and of the mercantile community, is that such a policy is tantamount to a policy "*for account of whom it may concern*." This evidence was rejected by the judge, and his decision was confirmed by the Supreme Court, apparently, and if so, most correctly, upon the ground that, the mere understanding of merchants, as to the construction and meaning of the policy, is not legal evidence. It is true, the court, misapplying a general principle, in effect say, that parol evidence cannot be received in any case, substantially to vary a written contract—a rule that literally followed, as we have already seen, would exclude the evidence of a usage in a vast ma-

(a) 1 *Phill.* 52.

majority of the cases in which it is received ; but this hazarded position is no part of the decision, of which the sole ground is the defective nature of the evidence offered. Had the plaintiff in this case, offered to prove that the construction on which he insisted, had been followed as a uniform and notorious practice between the companies and the assured, in the settlement of losses, the evidence could not with propriety have been rejected. The usage would not have contradicted the policy, it would have been strictly explanatory, and probably would have imported no more, as Chancellor Walworth in his opinion in the Court of Errors distinctly intimates, than the law would imply. Indeed, the chancellor expressly states, that such a usage would be valid. "If such a custom," he says, "prevails in the insurance companies in this country, I see no objection which could arise to the filling the blank in the policy with the names of any persons legally entitled to its benefit, or with the words for whom it may concern." It is proper, however, to add that the usage of the insurance companies in New-York is directly opposed to that which was stated. Where a policy is delivered with a blank following the words "on account of," the insurance is considered in practice to be made for the sole benefit of the person effecting it.

NOTE XXII.

P. 275, § 68. The position that has since been so frequently repeated, that a usage or custom, must be consistent with the rules of law, and is only valid, when the law is doubtful, is probably founded upon the decision of the King's Bench, and the language in which the judges there expressed themselves, in the case of *Edie v. The East India Co.* (2 Burr. 1216.) It was there decided, that evidence of a usage could not be admitted to show that the negotiability of a bill of exchange is restrained, when it is endorsed to a particular person by name, omitting the words "or order," and the ground of the decision certainly was, that, by previous decisions, the law had been otherwise set-

tled. Lord Mansfield, and the other judges, with the exception of Mr. Justice Wilmot, content themselves with saying, that as the law in the case before them was known and settled, the evidence of an opposite custom ought not to have been admitted; but Mr. J. Wilmot uses general expressions, that seem to have led to the error, that, to a certain extent, has since prevailed. He says—"Where there is a doubt about the custom, it may be fit and proper, to take the opinion of merchants, but this is only where the law is doubtful." It is this language which Mr. Marshall repeats, and which judges in the United States have subsequently repeated as evidence, that, in no case can usage be admitted to establish a rule different from that which the law certainly prescribes; but, in thus extending the application of his words, the limitations intended by the learned judge, have been wholly overlooked. In the first place, the language of Mr. J. Wilmot was confined to cases, in which the rule to be applied, depends solely upon the general custom of merchants, and what he meant to say, and in a subsequent part of his opinion, did explicitly say, was, that when such a custom has once been recognized, and established by the decisions, evidence, to show that it does not exist at all, cannot be admitted. In the second place, the decision of the court had a special reference to the nature of the contract, in a bill of exchange. The reasoning of all the judges is—that a bill of exchange, as an original contract, is negotiable, and consequently, as the rights of an assignee for a valuable consideration are derived from the drawer of the bill, they cannot be varied by the act of an intermediate party, which, in effect, is merely saying, that a contract between A., (the drawer,) and C., (the endorsee,) cannot be varied by the act of a third person, (B.,) the endorser. Certainly the court of King's Bench never meant to say, that the sole parties to a contract may not, by mutual consent, change the application of a rule of law, by which their rights would otherwise be governed; nor that an existing usage may not, in many cases, be sufficient evidence of their consent; and of this, the subsequent decisions of the same court, Lord Mansfield still presiding, in *Long v. Allen* and *Newman v. Ca-zalet*, are conclusive proof. If, then, evidence of a usage

may be received for this purpose in any case, the only test of its admissibility in all, must be that suggested in the text, namely, whether the rule of law, that the usage supersedes, is one, that in its application to their own contract, the parties themselves were competent to change. If this position be correct the propriety of the decision of the Supreme Court of New-York, in *Frith v. Barker*, (2 Johns. 328,) seems very questionable. It was there held, that evidence could not be admitted to show, that by usage, the ship-owner or master is entitled to full freight when the casks in which perishable goods, such as sugar, rum, &c., have been stowed, arrive and are delivered; although the goods within may have been lost by wasting, or even by the perils of the sea, during the voyage; and the ground of the decision was, that the usage contradicted a settled rule of commercial law. Now the rule in question is certainly one that the parties may change by an express stipulation. It is not, in the proper sense of the words, a general rule of commercial law, but relates solely to the proper construction of a particular contract, a bill of lading, and the rights of the parties under it; and it is difficult to see, why the construction of a bill of lading may not be varied by usage, to the same extent, as that of a policy of insurance. It is equally a rule of maritime law, that the master is not entitled to passage money, unless the ship arrives in safety; yet it has been repeatedly determined, that this rule may be superseded by an opposite usage. (*Abbot on Ship., Story, ed., Note, p. 279.*) Is there any real distinction between the rule relative to the transportation of persons, and that relative to the goods? If the one may be contradicted and superseded by usage, why not the other? Nor, in truth, is there any injustice, in these cases, in permitting the usage to govern the contract, when the evidence of its existence is such as the law requires. When the usage is, in the proper and full sense of the words, general, uniform, and notorious, we may be certain, that, by its adoption, we shall give effect to the intentions and agreement of the parties.

It is to be observed, that the judgment of the Supreme Court in *Frith v. Barker*, is not to be regarded as a decision of the question, as to the validity of the alleged usage. As the

testimony was wholly insufficient to prove the existence of the usage, that question did not properly arise, and this, the Chief Justice, who gave the opinion of the court, distinctly admitted.

In addition to the cases of *Long v. Allen*, *Newman v. Cazalet*, and *Palmer v. Blackburne*, a recent decision of the Court of Exchequer, *Stewart v. Aberdeen*, (4 *M. and W.*, 211,) may be referred to as a decisive authority. It proves that a general and established rule of law may be set aside, even by a particular and local usage, where the knowledge of the parties is sufficiently proved. It is a general, and a very salutary rule of law, that an agent, who is employed to collect a debt, has no right to consent to a set-off of a debt due from himself against that which he is authorized to receive, and that a payment made in this manner to the agent, is no discharge of the debtor, as against the principal. In the application of this rule to a policy of insurance, it had been repeatedly determined, that a payment made by an underwriter to an insurance broker, merely by the allowance of a credit, is no bar to the recovery of a loss by the assured.^(a) Yet, in *Stewart v. Aberdeen*, it being clearly proved, that by the usage at Lloyd's, where the policy in question was effected, it was customary for the underwriters and brokers, in the settlement of their accounts, to set off losses due to the assured, against premiums due from the broker, and there being sufficient evidence, in the opinion of the court, that the existence of the usage was known to the plaintiff, the assured, it was held, that he was concluded by a settlement made in conformity to its terms. In other words, that the underwriter *was discharged*, and the agent alone responsible for the loss that was claimed.

The following American decisions, *McGregor v. The Ins. Co. of Philadelphia*, (*Sup. Note* 20,) and *Trott v. Wood*, (*Note XVII.*) may, with propriety, be referred to as sustaining the doctrine of the text. The effect of the usage in the first, was to change the rule of law relative to the

(a) *Todd v. Reid*, (4 *B. & A.* 210,) *Russell v. Bangley*, (4 *B. & A.* 395,) *Scott v. Irving*, (1 *B. & Ad.* 605,) *Bartlett v. Pentland*, (10 *B. & C.* 760.)

computation of a loss under an open policy upon freight ; and it was admitted by Mr. J. Washington, that if the assured had been chargeable with notice of the usage, he would have been bound by it ; that is, although contradicting a settled rule, it would have governed the construction of the contract. So, in *Trott v. Wood*, the usage was relied on as controlling and superseding a most important general principle of maritime law, and Mr. J. Story expressly says, that if the usage had been shown to be uniform and general, it would have constituted a legal defence. The usage was rejected as insufficiently proved, not as illegal and void.

Nor are the cases that have been cited all that are applicable to this subject ; on the contrary, it will now be shown that the principle that an established and general rule of law applicable to the rights of the parties under any mercantile contract, may be controlled and superseded by a general or local usage, has been settled in the United States by the decision of a court, not merely of high, but, upon such questions, of paramount authority, the Supreme Court of the United States. Before I proceed, however, to state the case to which I refer, it is necessary to give an analogous decision of a highly respectable state tribunal.

It is a general rule of commercial law, that the owner of the vessel is liable, upon the bill of lading, for the safe transportation and delivery of the goods shipped. The bill of lading, although signed by the master alone, is equally the contract of his principal, the owner ; yet in the case of *Halsey v. Brown*, (3 Day, 346,) it was held by the Supreme Court of Connecticut, that this rule was controlled and superseded by the usage and custom of merchants in Connecticut, that the freight of specie, received for transportation, by the master of a vessel, is his perquisite, and that the contract embraced by the bill of lading, is, in such cases, considered as personal, binding upon the master only, and not upon his owners. It was insisted by the counsel for the plaintiff, that the law being settled, no evidence of an opposite usage could be admitted ; such evidence being only admissible when the law is doubtful ; and the case of *Edie v. The East India Co.* was relied on as a conclusive au-

thority. But the court said, "The general law applicable to the commercial world, that owners of vessels are answerable for the contracts and conduct of their masters, when acting in the scope of their authority, must be admitted; but, as it is a principle, that the general common law may be, and in many instances is, controlled by special custom, so the general commercial law, may, by the same reason, be controlled by a special local usage, so far as that usage extends, which will operate upon all contracts of this nature, made in view of, or with reference to such usage." This case has a peculiar importance and value from the fact, that it was subsequently referred to, and the principle upon which it was founded, adopted as the ground of their own decision, by the Supreme Court of the United States.

It is a settled rule of law, that the payment of a promissory note, in order to charge the endorser, must be demanded on the third day of grace, but it has long been the usage of the banks in the District of Columbia, not to demand payment until the fourth day; and in the case of *Renner v. Bank of Columbia*, (9 *Wheat.* 582,) in which the plaintiff in error relied upon the general rule, it was held, that in respect to him it was entirely superseded by the usage, as it clearly appeared from the circumstances proved, that he had endorsed the note with a full knowledge of the custom. The judgment of the court was delivered by Mr. Justice Thompson, and his opinion contains a full review of all the previous cases, and among these he cites that of *Halsey v. Brown*, with an entire and emphatic approbation.

The reader will observe that this case goes much further than *Halsey v. Brown*, since it establishes that a general rule of law may be superseded even by a usage strictly local, when it appears from other circumstances that the contract was made in reference to the custom. The principle of the decision, therefore, entirely corresponds with that of the King's Bench, in *Gabay v. Lloyd*. In *Halsey v. Brown*, the usage was general in the sense given to that term in the text. It was a usage of the State of Connecticut, and as such, the law of that state, binding upon the parties by the mere fact of its existence. Vide also, *Jones v. Fales*, (4 *Mass.* 252.) *Lenox & Kennebeck Bank v. Page*,

(9 *Mass.* 158,) and *Bank of Utica v. Smith*, (18 *Johns.* 270.)

NOTE XXIII.

P. 281, § 74. *De Longuemere v. N. Y. F. Ins. Co.*, (10 *Johns.* 12. *Sup. Note V.*) The same construction has been given to the word "port," in a time policy upon the vessel; *Cockey v. Atkinson*, (2 *B. & A.* 460,) but the construction is here founded not upon extrinsic facts, but the nature of the insurance. The intention of such a policy is, to give to the assured the right of employing the vessel in any trade he may deem proper. By construing the word "port," in its usual and positive sense, this liberty would be greatly abridged.

In *Hancox v. Fishing Ins. Co.*, (3 *Sumn.* 134,) the particular nature and usages of the voyage were extrinsic facts, that satisfied the mind of the court, that the word "proceeds" was used by the parties in the policy, in a distinct and peculiar sense.

The case of *Neilson v. Delacour*, (2 *Esp.* 619,) may also be referred to under this head. The insurance was on a ship from Liverpool, to any of the windward or leeward-islands—words that would comprehend all those islands, to whatever country or government they might belong; but as England was at war with France when the policy was effected, French islands were held to be excluded. The vessel sailed for Guadaloupe, which, although before her arrival, it had surrendered to an English force, was a French island when the policy was effected. Lord Kenyon held, that it could not for that reason have been in the contemplation of the parties, and, therefore, nonsuited the plaintiff. The extrinsic facts, here, were, the existence of war between England and France, and the possession of Guadaloupe by the latter power, when the insurance was made.

Whether parol evidence of the declarations and conversations of the parties at the time their contract was made, may be received, in order to show in what sense general words were in fact used by them, or to determine particular words

to a distinct and peculiar sense, is a question that I have purposely omitted, to discuss in the text. The authorities are conflicting, and I have found myself, not only unable to reconcile them, but to state any distinction satisfactory to my own mind, upon which the propriety of admitting the evidence can be founded. Its admission seems in many cases highly reasonable; but the difficulty is, how to reconcile its admission in any, with the established rule of law, that forbids the alteration of a written contract, and even, in a court of law, the correction of mistakes, by parol evidence. From this rule, the evidence of usage and of extrinsic facts have always been considered as exceptions, as not within the mischief that the rule is designed to prevent; or perhaps the rule itself, adopting the distinction of a late able writer, excludes only parol evidence of the *language* of the parties, contradicting, varying, or adding to, that which is contained in the written instrument. (1 *Greenleaf*, 333.)

It is doubtless true, that the declarations of the parties are admissible in evidence to determine the subject matter of the contract, and in these cases, it is evident, upon reflection, that the evidence is not merely proper, but necessary and indispensable.

Declarations relative to the subject matter of a contract, are always founded upon extrinsic facts. The facts determine the construction, and the declaration is only relied on as evidence, that they were communicated to the party to be affected by the knowledge. It is properly a notice, and, therefore, like all other notices, not required by law to be in writing, is necessarily to be proved by parol evidence.

Thus, where the charterer of a ship, which he has underlet for a larger sum than by his own charter party he is bound to pay, insures this surplus interest by the name of "freight." The word, it has been held, is not properly applicable to such an interest, nor would the insurers be obliged so to understand it, unless the fact, that it was the interest meant to be covered, had been disclosed to them. When the communication is made, the policy is valid.(a)

(a) *Nesmith v. Nat. Ins. Co.*, (1 *Hall*, 452.)

Here a peculiar meaning is given to the word "freight," but the main ground of the construction, is the fact that the interest it denotes, was the only interest of the assured to which the contract could possibly be applied ; and the notice to the insurers is evidence of their consent, that this interest should be covered by the policy.

It is also probable, that where the words to be interpreted, are purely technical, so that the court and jury are wholly ignorant of their meaning, the declarations of the parties, showing the sense in which they understood them, may be received in evidence, with the same propriety, as the testimony of witnesses, deposing to their personal knowledge of their usual application.

But the cases we are now considering, are those in which the words to be interpreted do not relate to the subject matter of the contract, and have a known, definite, and popular sense, in which the court would be obliged to understand them, so that the effect of the evidence is to alter their plain import and necessary interpretation. If, in these cases, the oral declarations of the parties may be admitted, to show in what sense, different from its ordinary meaning, even a single word was understood, why may not the same evidence be given in relation to each and all the words of the instrument? If the import of a single word can thus be altered, why not that of the whole contract? How and where is a line of distinction to be drawn, by which the established rule of law can be saved from an entire subversion? I am, therefore, forced to declare my adherence to the rule, as stated by the latest and ablest writer upon evidence, that "where a contract is made in ordinary and popular language, to which no local or technical and peculiar meaning is attached, parol evidence," (with the exceptions already stated,) "is not admissible to show, that, in that particular case, the words were used in any other than their ordinary and popular sense." (1 *Green*. 534.)

The cases that seem opposed to this conclusion, are, *Birch v. Depeyster*, (4 *Camp*. 385,) and *Gray v. Harper*, (1 *Story*, 574.) In the first of these cases, C. J. Gibbs admitted evidence of the conversations of the parties, to show the meaning which they attached, at the time, to the word

"privilege," which was inserted in their written contract ; and in the second, Mr. J. Story intimated a clear opinion, that the same evidence might be admitted to show in what sense the word "cost" was intended to be used by the parties in the contract which was the subject of the suit. It is possible, however, that both these cases may be reconciled to the general rule, by considering the words "privilege and cost," as technical ; and, indeed, it seems to have been upon this ground that C. J. Gibbs placed his decision.

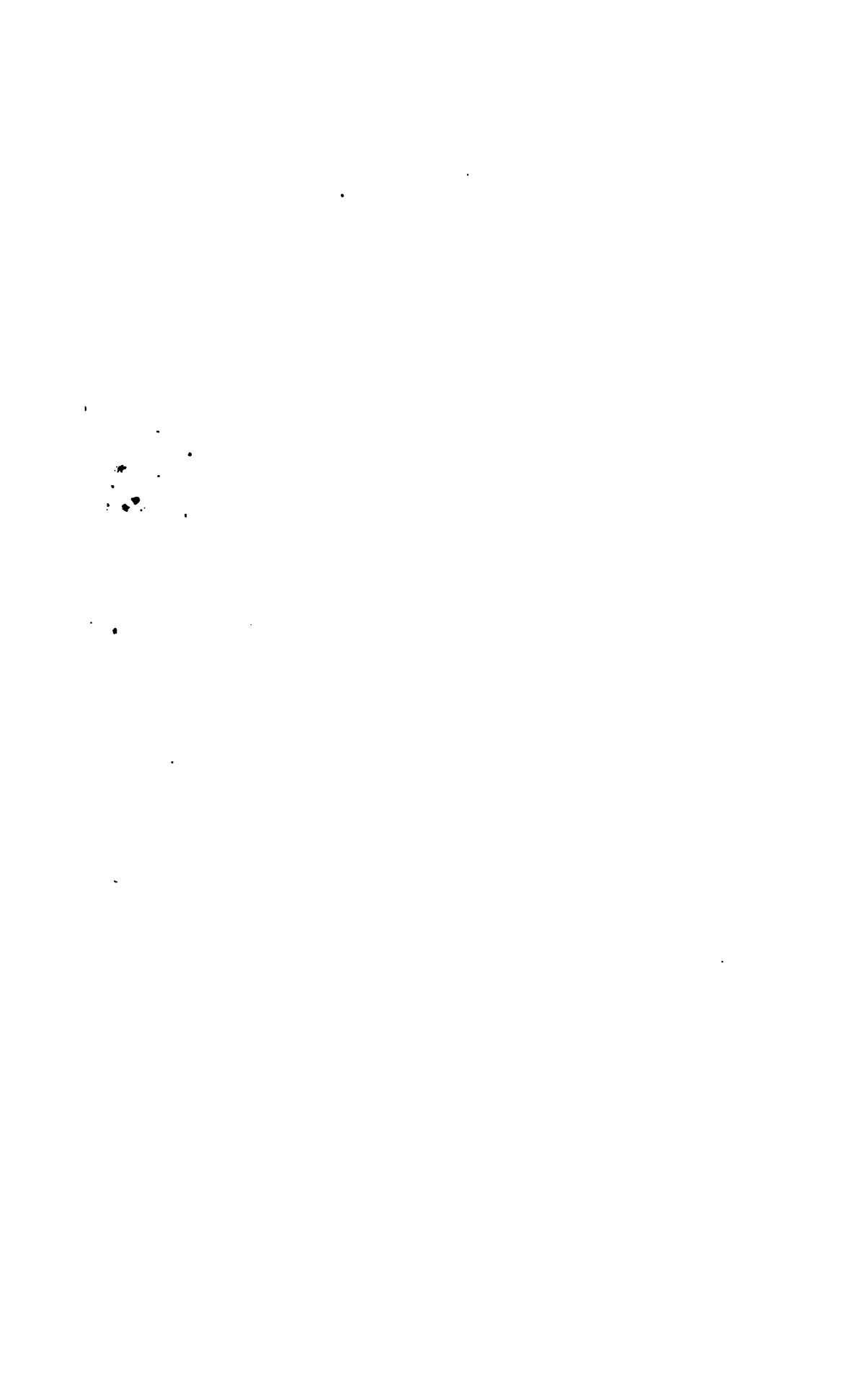
In a subsequent case, however, before C. J. Abbott, (*Taylor v. Briggs*, 2 Car. & Payne, 525,) in which the question related to the technical meaning of the word "bales," as applied to cotton ; that eminent judge rejected the evidence of a broker, as to what was said by the parties at the time "That sort of evidence," he observed, "when there is a written instrument signed by the parties, and a particular construction of it will much benefit one party, and injure the other, is *too dangerous* to be relied on." It is remarkable, that in each of these cases, the decision of the judge was acquiesced in by the party against whom it was made ; so that the law, even in respect to technical words, is still unsettled.

Although, it is probable, that the oral declarations of the parties are not admissible in evidence, for the purpose that has been stated, it is a very different question, whether other writings, affording *certain* evidence of the intentions of the parties, may not be received ; and I apprehend, that, when the effect of the evidence is, not to alter the plain import of the policy, but merely to determine the construction of an ambiguous clause, or words, it ought to be admitted. It is, indeed, a settled rule, that all contemporaneous writings relative to the same subject matter, are admissible in evidence ;(a) but those writings to which I now refer, are such as are prior in date and execution. In respect to these, the general rule undoubtedly is, that all the provisions and stipulations they contain, are merged in the principal and final contract ; and, therefore, they

(a) 1 Greenleaf, 334, § 283.

cannot be admitted to vary the import of the policy. But the ground of the rule is, the presumption that the parties meant that the policy should contain the whole of their agreement, and the admission of evidence to alter or extend that agreement, would be inconsistent with this presumption. It is manifest, however, that the reason of the rule is not at all applicable, when it is confessed that the policy was meant to correspond with the previous writing, and the writing is resorted to for the sole purpose of explanation, and consequently, to such cases the rule itself ought not to be held to apply. Thus, where the policy is founded upon a representation or agreement in writing, and it is admitted, or certainly proved, that the facts or conditions contained in this previous writing, were meant to be embodied in the policy—a particular provision, however, as expressed in the policy, from an accidental omission, or change of phraseology, is obscure and ambiguous, but by a reference to the previous writing, the ambiguity is removed, and the intentions of the parties rendered clear and certain. In such a case, it would seem unreasonable to drive a party, who seeks no discovery, into a court of equity, to ask the interpretation of his contract upon the same evidence that a court of law, without hazard, and without the violation of any principle, might certainly admit.

The Court of King's Bench, in the case of *Etches v. Aldan*, (1 Man. & Ryl. 157,) seem to have gone even further than the principle for which I contend. They admitted the plaintiff, in order to determine the true construction and proper subject-matter of his own policy, to give in evidence a prior policy by the same defendants to another party. His own policy was an open policy for £400, upon freight, the gross freight was £800; and the underwriters, therefore, insisted that the plaintiff was his own insurer for one half of the freight, and consequently, was entitled to recover only one half of the amount of his policy; but to repel this defence, he was permitted to show, by a reference to a prior policy, covering advances on the same freight, that his own intention was only to insure the net freight, deducting the advances, and that this was known to the insurers; and this evidence was held by the court to be conclusive.



ILLEGAL INSURANCES.

BREACH OF MUNICIPAL LAWS.

LECTURE III.

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§ 1. Insurances, void in their origin, as contravening the laws of the state in which they are effected, are the last subject of preliminary inquiry.

In numerous cases, an insurance is void in its origin, either as violating some law, relative to the form or provisions of the contract, or in consequence of a breach, by one of the parties, of a condition or duty, that the contract imposes or implies; but these cases will be found to bear a direct relation to some of the terms or provisions of the policy itself, and it is in connection with these, that they will properly be treated. In the cases now to be considered, the invalidity of the insurance does not proceed from any law, having an immediate relation to the contract, nor defining, or attempting to define, in any manner, the rights and duties of the parties. Hence, they would find no appropriate place in our proposed analysis of the policy, but require, of necessity, to be separately considered.

Legitimate insurances are the proper subject of our main inquiry, and those which do not fall within the range of the definition, are, in the first instance, to be carefully distinguished and excluded.

Insurances, thus illegal, and void in their origin, may be conveniently divided into three classes :—

1. Insurances in contravention of the laws of revenue and trade, of the state in which they are effected.

2. Insurances in contravention of the rights of the state, as a belligerent power.

3. And lastly, insurances in contravention of the duties of the state as a neutral power.

1. *Insurances in contravention of municipal laws of revenue and trade.*

§ 2. Every civilized government, for reasons that will hereafter be examined, not only permits, but in truth, encourages, its own subjects, or citizens, to violate the prohibitory laws of revenue or trade of other countries; but every government is sufficiently anxious to protect its own laws, of a similar character, from the slightest breach or invasion. Hence, in every country, not only are severe penalties inflicted upon the persons and property of those by whom these laws are violated, but every contract, of every description, that tends, in any degree, to favor or encourage such violation, is contaminated by the illegality it seeks to protect, and perishes from the taint. . This observation applies, with a peculiar force, to an insurance upon a prohibited trade. There can be no more direct encouragement to the violation of a law, than a contract that secures an indemnity to the transgressor. Hence, by the general consent of jurists, it is, in all coun-

tries, absolutely void.(a) It is of no consequence, that the insurer was fully informed of the nature of the risks he was desired to assume. He had no right to assume them. It is of no consequence, that, on the trial of an action upon the policy, the insurer is silent as to its illegality. He may not choose to raise the objection, but, as soon as its existence is disclosed—and its disclosure, generally speaking, is inevitable—the court will declare the nullity of the contract, and dismiss the suit.

§ 3. Mr. Marshall states, as the opinion of Roccus, an Italian jurist of much celebrity, that an insurance upon a prohibited trade is only invalid where the insurer was ignorant when he made the contract, of its true character and risks ; but this opinion of Roccus, although broader in its terms, has always been considered as applying to a voyage, or trade, prohibited by the laws of a foreign country, or of war, not, to a commerce interdicted by the law of the place where the contract was made, or is sought to be enforced ; and by this construction the seeming discrepancy between this eminent jurist, and all other writers of authority, is at once removed.(b) It would indeed, be a strange departure from the most obvious and imperative maxims of public policy, were a government to permit its own tribunals, to enforce the execution of a contract, involving a violation, and tending to the subversion of its own laws ; and these, laws, so inti-

(a) Note I.

(b) 1 Marsh. 56. 1 Emerigon, ch. 8, § 5, p. 212. 2 Valin, 130, note. Boulay Du Paty's Emerigon, p. 220, n. 3 Kent's Com. 5th ed., p. 262. 264, n. Roccus, n. 21. In his construction of Roccus, Mr. Marshall has followed Mr. Park, (1 Park, 502.)

mately connected with the well-being and prosperity of the state, as those of revenue and trade are usually considered.

§ 4. Where an insurance, prohibited or void, by the laws of the country in which it was made, is sought to be enforced in the tribunals of another, the defence of illegality, may doubtless, be waived by the insurer. The objection, unless raised by him, will not be noticed by the court, who have no judicial knowledge of foreign laws, except so far as they are the subject of proof, but when an insurance, valid by the *lex loci*—the law of the place where the contract was made—violates directly or indirectly, the laws of the country, where a remedy is sought, the court will withhold all aid from its execution, with the same determination, and for the same reasons, as if the policy had been effected within its jurisdiction. It may not rescind the contract, or with truth declare it to be void in its origin, but will leave the assured to seek relief in the tribunals of a country, where, in consistency with its own laws, the validity of his contract may be upheld.^(a)

§ 5. The invalidity of an insurance, as an implied violation of the laws of trade, may arise, from the character of the goods exported or imported, the nature of the trade, or the breach of some statutory provision, relative to the navigation of the ship, or conduct of the voyage. In order to show the grounds of the decisions, some examples will be given from each of these classes.

1. *Character of the goods.*

§ 6. When the exportation or importation of

(a) 3 Kent's Com. 5th ed., 262.

the goods shipped, is prohibited, the illegality affects, not only the policy upon the goods themselves, but equally those upon the ship and freight, since the voluntary reception of the goods, by the master, is as much a violation of law, as their shipment by the owner.^(a) Generally speaking, the illegality works a forfeiture of the ship and of the goods; and it is intimated, in some of the decisions, that it is only where the subject insured is liable to forfeiture, that the insurance is void; but the better opinion undoubtedly is, that where the prohibited act, whatever may be the nature of the penalty imposed, renders the subsequent voyage, or trade, illegal, as a necessary consequence, it vacates the policy.^(b)

§ 7. By an act of Congress,^(c) no goods brought into the United States, from any foreign place, can be unladen, or removed from the vessel in which they are brought, without a special license or permit, in writing, from the collector, or other officer of the customs, at the port of importation, and a pecuniary fine or penalty is imposed upon all persons, who shall, knowingly, aid, or be concerned, in such unlawful unlading or removal. In a case before Mr. J. Story, where the master, who was also a part owner of the ship insured, received on board, clandestinely, an anchor, brought in another vessel, into the port of New-Orleans, from a foreign place, and unladen without a permit, it was held by that eminent judge, that the act of the master was a plain violation of the statute, and subjected

(a) *Gray v. Sims*, (3 *Wash. C. C. R.*, 216.)

(b) Note II.

(c) Duty act of 1799, § 50. *Laws of U. S.*, (*Story's ed.*, vol. 1, p. 619.)

him to the penalty imposed ; and he intimated a clear opinion, that, had the illegality occurred at the inception of the policy, as the vessel had no right to sail with the anchor on board, it would have rendered the contract utterly void, as to all the owners. The insurance, he observed, was on account of all the owners, and was, therefore, not divisible, so as to be good in part and void in part, and it was a necessary consequence, that the illegal act of one, would have the same effect, as if all had participated. The case was, however, decided, upon other grounds, in favor of the assured.(a)

§ 8. There is, it has occurred to me, a distinction on this subject, plainly implied in the observations of Mr. J. Story, that is material to be noticed. In all cases, where, by the violation of a law of trade, the property insured, is subjected to forfeiture, the insurers are, doubtless, discharged ; but, when the law, creating no forfeiture, limits itself to the punishment of the offender, the participation or privity of the assured is probably necessary to be proved, in order to avoid the policy. Thus, should the master of the ship insured, not being himself a part owner, receive on board prohibited goods, under circumstances not inducing a forfeiture, his illegal act, if it clearly appeared, that it was committed without the authority or privity of his owners, ought not to be alleged as a bar to their recovery. To declare their contract, under such circumstances, to be void, would seem to be an unreasonable and unjust extension of the established doctrine. There is a decision of the

(a) *Clark v. The Protection Ins. Co.*, (1 *Story*, 109, note.)

King's Bench, that may, with propriety, be urged in support of this position. The goods insured had been duly entered at the custom-house, but were put on board after the master of the vessel had obtained his manifest and clearance, and he omitted to enter them in the manifest, and obtain a second clearance. This omission was a violation of an act of Parliament, and subjected the vessel to forfeiture ; but as no violation of law or even negligence was imputed to the assured, the misconduct of the master was held to be no bar to his recovery.^(a) The illegality in this case would certainly have avoided a policy upon the ship herself, but, although it rendered her voyage illegal, it was not permitted to affect the innocent goods of an innocent owner.

It must be admitted, that there is not a perfect analogy between the case of a shipper of goods, and that of the owners of the ship. The master is the agent of his owners, not of the merchant, and hence, in many cases, it will hereafter be seen, the unauthorized acts of the master are imputed to the owners, and operate to discharge the insurers ; but the discharge of the insurer in these cases, rests upon the ground, that the misconduct of the master, had either proved the direct occasion of the loss, or had altered permanently the risks of the policy ; no reasons of justice, or policy, seem to require a similar construction, when the unauthorized and illegal act of the master, while it subjects him to punishment, cannot by possibility occasion a loss,

(a) *Carruthers v. Gray*, (15 *East*, 35.) Vide also, *Dawson v. Attey*, (7 *East*, 367.)

nor increase in any degree, the risks of the insurer.(a)

§ 9. It is certain that the illegality of a voyage arising from the transportation of prohibited goods, is never permitted to affect a distinct policy, upon the lawful goods of a different owner. In the language of Sir William Scott,(b) the innocent goods of one merchant are not to be confiscated on account of the misconduct of another; and where the goods insured are neither subject to forfeiture, nor their owner involved by any co-operation or privity in the illegal act, it would be plainly unjust to avoid the insurance; nor are there any reasons of public policy, that require so harsh a construction.

§ 10. The decisions have even gone beyond the principle that has been stated. Even the innocence of the assured, is not in all cases essential to his protection; it may be regarded as settled law, that where the goods insured by one policy, are all of them lawful, the insurance is valid, even where the assured, as owner or otherwise, is interested or concerned in the transportation of unlawful goods, by the same vessel;(c) and, although the infection of illegality, can, in no case, be communicated to the innocent goods of an innocent owner, it is material to remark, that upon other grounds, arising from the illegality, the policy of the owner may be defeated. When he knows, or has just reasons to

(a) It has been decided in England, that the act of the master in sailing without convoy, without the authority or privity of his owners, will not affect the insurance, but these decisions are founded on the express words of the convoy act. *Carstairs v. Allnut*, (3 *Camp.* 497.) *Metcalf v. Parry*, (4 *Camp.* 123.) Vide Note XIII.

(b) *The Jonge-Clara*, (1 *Ed. Ad. Dec.* 371.) *Pieschell v. Allnut*, (4 *Tsunt.* 792.) Vide Note III.

(c) Vide Note IV.

believe, that prohibited goods are to be transported in the same vessel with his own, and that by such transportation the general risks of the voyage will be increased, his omission to disclose the facts to his insurer might justly be considered as a material and fatal concealment.

§ 11. Where an insurance is made upon goods generally, or upon goods of different kinds specified in the policy, but included in one valuation, the contract in judgment of law is entire, so that if any portion of the goods, however inconsiderable, be prohibited, the illegality infects and vitiates the whole insurance, and thus precludes a recovery by the assured of any part of his loss.

§ 12. Thus, where the insurance was upon goods to be thereafter specified, valued at £10,000, and among the goods afterwards declared by the assured, there was a small amount of naval stores, of which the exportation was then prohibited, it was held by Lord Ellenborough,^(a) and the court of King's Bench confirmed his decision, that the contract was in its origin entire, in respect to all the goods, and could not be severed by any subsequent act of the assured; and that, as a necessary consequence, the partial illegality rendered it wholly void; and in delivering the judgment of the court, he stated the principle to have been established by numerous decisions, that when a party insures his goods altogether in one policy, and some of them are of a nature to render the voyage illegal, the whole contract is illegal and void.

In a case, long subsequent, where the goods insured were of different kinds, and were specified

(a) *Parkin v. Dick*, (2 Camp. 221. S. C. 11 East, 502.) Note IV.

in the policy, but embraced in a general valuation, although only a portion of them was unlawful, the same doctrine was held, and was applied to defeat the entire claims of the assured. (a)

§ 13. It is difficult to collect from these decisions what are the precise limits to which this doctrine of the entirety of the contract ought to be subjected. There are, doubtless, numerous cases that it cannot properly embrace, and it has, probably, been laid down by Lord Ellenborough, in more broad and general terms than the courts would be inclined to follow. Certainly it is not a doctrine that, from its equity, deserves to be extended: on the contrary, it should be pressed within the narrowest limits, that, with a due regard to the precedents, can be imposed. The rule that it prescribes is merely technical, and, in its application, partial and unjust. It looks, solely, to the form of the contract, and does not apply at all where the lawful goods are separately insured. Hence, it punishes the assured, not for his violation of law, but for his want of caution or skill in framing the policy. Its operation, too, in the cases to which it applies, is most unequal. It pays no regard to the proportion that the prohibited goods bear to the lawful. Where they constitute nearly the whole of the cargo, the injustice of denying the claim of the assured for the loss of the residue, may seem to be trifling; but where they form a very inconsiderable part, it is apparent and revolting. Finally; the rule imposes a heavier penalty than the Legislature designed. By refusing an indemnity to the

(a) *Camelo v. Britten*, (4 B. & A. 184.) *Kerr v. Andrade*, (6 Taunt. 498.) Vide Note IV.

assured for the loss of prohibited goods liable to confiscation, the plain intention of the Legislature is carried into effect. The loss is exactly that which it was meant he should sustain ; but to deny him an indemnity for lawful goods, because they were embraced in the same policy with those that are prohibited, is, in all cases, to inflict a penalty greater than was intended ; frequently, most disproportionate in its amount, and always partial, as not applying to all who commit the offence, and, therefore, unjust in its operation.

§ 14. It seems a just conclusion, from these remarks, that the rule in question ought never to be applied, except where the contract is necessarily entire, and that no contract ought to be so adjudged, that may reasonably admit a different construction. The contract is, of necessity, entire, where the goods insured, whether the insurance be general or specific, are included in one gross valuation. But, where an insurance is specific upon different kinds of goods, and a separate value is affixed to each denomination, the contract is as truly distinct, in respect to each, as if that alone were the subject of the policy.

It appears to me, that the same construction ought to be adopted, where the policy is open, upon different kinds of goods, and each kind is specified, and declared subject to its own average. As the separate prime cost of each denomination is then, in respect to each, the measure of value in the computation of a loss, it may reasonably be held to produce the same effect, in severing the contract, as a separate valuation. So, where the policy, whether open or valued, general or specific, is upon goods by ship, or ships, each shipment may

justly be regarded, not only as a practical, but a legal severance of the contract. Should such an insurance be made, say for £60,000 sterling, and goods to that amount be shipped, in different vessels, all innocent and lawful, with the exception of the value of £500, shipped in one vessel ; it would be extravagant to hold, that this partial illegality would infect and vitiate the entire contract, so as to avoid the insurance upon all the goods covered by the policy, not only in the same, but in *all* the vessels. A seeming difficulty, in the severance of the contract, is removed, in all such cases, by the necessary declaration of the assured, as to the value of the goods shipped in each vessel.

§ 15. In judging of the entirety of the contract, we are not, in all cases, to direct our attention solely to the subject insured. Where the interests of several persons are covered by the same policy, and the question arises, whether, by the act of one, the rights of all are to be affected, we must, necessarily, consider, whether the contract is entire, in respect to all, or may be construed as a separate insurance for each. An insurance, in one policy, for the owners of a ship, we have already seen, (a) is not divisible, but the illegal act of one, without the knowledge or privity of the others, has the same effect, in avoiding the entire contract, as if all had concurred ; and the same rule, doubtless, prevails in all cases, where the persons, for whose benefit the insurance is made, have a joint, or common interest in the subject insured. But, the contract will not be regarded as entire, when the insurance

(a) *Clark v. Protection Ins. Co.* Sup. p. 319,

is made by a common agent, on account of several persons, whose interests are several and distinct; on the contrary, it will then receive the same construction, as if each separate interest had been separately insured, by a separate agent; (a) and even where the suit is brought in the name of the agent, for the benefit of all, the invalidity of the contract, in respect to any one or more of the parties, will not defeat a recovery for the benefit of those who had not participated in, nor consented to the illegal act, or transaction, from which the invalidity arose. It is, however, intimated by Lord Ellenborough, that a different construction would be given to the contract, should it appear, that the common agent had been appointed, or employed, by the joint act, or consent, of all the assured.

Should several persons, without the intervention of an agent, effect a policy, in their own names, without a specification of their several interests, the contract would be, on its face, entire, and evidence to show that the interests of the assured were, in truth, distinct, I apprehend, would be rejected as repugnant to its terms. It may, also, be considered as, at least, doubtful, whether the same construction would not be imperative, should the common agent of several persons, even without their authority or consent, include the property insured, in one common and gross valuation. I am not prepared to say, that the valuation could be opened and apportioned. It would, probably, be regarded as conclusive evidence, that it was an integral, or joint interest, that was meant to be covered; yet, should the courts, in the exercise of a liberal, but not unreasonable discretion, decide that

(a) *Hagedorn v. Bazett*, (2 M. & S. 105.) Vide Note V.

in such a case, for the protection of an innocent party, the valuation might be opened, and distributed, there would be no difficulty in stating the rule for its apportionment. The ratio of apportionment is readily found, by ascertaining the proportion that the prime cost of the goods of each owner, bears to the prime cost of all that the valuation includes ; so that, should the prime cost of the goods of a particular merchant, amount, say to one-fourth of the prime cost of the whole, he would be entitled to consider one-fourth of the valuation as the sum insured on his account.

2. *Nature of the Trade.*

§ 16. It has been the general policy of the European powers to confine to each mother country, and its vessels, the trade with its own colonies ; and, until a recent period, this system of jealous exclusion was maintained by England, with a stern and undeviating rigor. The tendency of the system to promote, even the interests of the parent state, may well be doubted. That it affects most injuriously the growth and prosperity of the colonies themselves, is a truth too manifest for denial. To their release from the fetters of the colonial system, the subsequent progress of the United States in wealth, population, and power, is mainly to be ascribed ; a progress, that, although impeded by much vicious legislation and other counteracting causes, is unexampled in the history of the world. But these are topics not exactly suited to our present inquiry. It is to the statesman that their consideration^(a) properly belongs.

(a) Vide M'Culloch's Dictionary of Com., vol. i. 2d ed., p. 330, and a very able article, by the same writer, on the subject of the Colonial Trade, in the 84th No. of the Edinburgh Review.

§ 17. By the provisions of the celebrated navigation act, the dubious glory of which is attributed to the commonwealth, but which was re-enacted, and greatly enlarged in the reign of Charles II., (a) the transport of all goods and commodities whatever, to and from his majesty's lands, plantations, &c., in Asia, Africa, or America, in any other than a British vessel, duly manned and navigated, is prohibited under penalty of the forfeiture of goods and ship. The prohibition here is not limited to particular goods, it extends to all. It is an interdict of the whole trade. Hence every insurance, upon any voyage that the trade embraces, whether the policy be upon ship, goods or freight, is wholly void.

§ 18. A Danish vessel took on board her cargo, which was insured on a voyage from Bengal to Copenhagen, at Calcutta, contrary to the provisions of the navigation act, and although the policy was not void on its face, as the Danes at that time had possessions in Bengal, where, under the terms of the contract, the adventure might lawfully have commenced; it was held, that the lading of the goods at Calcutta, rendered illegal the subsequent voyage, during which the loss occurred, and was, therefore, a complete bar to a recovery. It was strenuously contended in this case, that the plaintiff ought, at least, to be permitted to recover back the premium he had paid, upon the ground, that being a foreigner, his ignorance of the law he had violated, might justly be presumed; but the court decided that no such presumption in favor of foreigners offending against the laws of England, could

(a) 12 Car. II. c. 18, § 1.

be admitted. It would be a dangerous relaxation of great political regulations ; more especially when the law that had been violated, was, from its nature and in its terms, peculiarly applicable to the subjects of foreign states.(a) It is indeed evident, that to establish such a distinction in favor of foreigners, would be contrary to all just notions of public policy, and would open a wide door for evasion and fraud.

In a subsequent case, where the vessel, which was Swedish, had taken on board, not the whole, but the smaller portion of her cargo at a British settlement in the East Indies, a similar decision was made, and the plaintiff was not allowed to recover any part of the loss ; and this, although the policy had fully attached on the goods previously laden. The contract was regarded as entire, and although valid in its terms, and when the risks commenced, the subsequent illegality discharged the insurers from all subsequent risks.(b)

§ 19. By a section of the navigation act, different from that which has been referred to, the transportation even in a British vessel of certain articles of colonial produce, from any of the English plantations in America, Asia, or Africa, to any port or place whatever, other than to another English plantation, or to England, Ireland, Wales, or Berwick-upon-Tweed, is prohibited under a similar penalty of the forfeiture of ship and goods.

§ 20. It was upon the proper construction of this section, that the defence of the underwriters was

(a) *Morck v. Abel*, (3 *Bos. & Pull.* 35.)

(b) *Chalmers v. Bell*, (3 *Bos. & Pull.* 604.) 2 *Car II.* c. 18, § 18.
Note VII.

rested, in a case where the ship and her cargo of colonial produce, were insured from a British West India island, to the port of Gibraltar, and were lost after her arrival in the outer road of Gibraltar, by the perils of the sea. In reply to the allegation that the voyage was illegal, it was insisted, on behalf of the assured, that Gibraltar was a plantation within the meaning of the law; and that, at any rate, the illegality of the transaction depended solely upon the unloading and putting on shore colonial produce, in a prohibited place, and not upon its shipment; and consequently, that, in the case under judgment, no illegal act had been committed. But the Court of King's Bench determined, that the word "plantation," in its common known signification, is applicable only to colonies, where things are grown, and which were settled, principally, for the purpose of raising produce, and therefore, it was not applicable, and had never, in fact, been applied to a place, like Gibraltar, incapable of raising produce, and wholly supplied from other places; and, in answer to the argument that the illegality of the transaction attached only upon the landing of the goods, Lord Ellenborough said, that though the forfeiture might only attach upon the landing of the goods, yet that the shipping them for that purpose, was illegal, and avoided the insurance on such a voyage; and the other judges concurred in his opinion.(a)

§ 21. This case is important as showing that it is the ultimate purpose of a voyage that fixes its character, and that the actual commission of the act, to which alone the penalties of a prohibitory law

(a) *Lubbock v. Potts*, (7 *East*, 449.)

are attached, is not necessary to avoid the policy. It is enough that the voyage is commenced, with the design of committing it. An American vessel leaving a port in the United States, for a port in the British West Indies, in no case incurs a forfeiture by the mere act of sailing; but where the object of the voyage is a prohibited traffic, an insurance made upon the vessel or cargo in England, would be certainly void, and should the vessel be lost on her passage, the insurers would not be liable.

§ 22. But the existence of an intention, at the inception of an entire voyage, to violate a prohibitory law, to render that voyage illegal, must be established by the clearest evidence; it must be absolute, and, so far as depends upon the discretion of the master of the ship, unchangeable. Where it is conditional, or may be abandoned, it has no effect on the character of the voyage, or the validity of the insurance.

§ 23. A ship, which, although owned by British subjects, was held by the court, under the peculiar circumstances of the case, to be an alien ship, was insured on a voyage from Ramsgate to St. Michael's, (one of the Azores,) and was there seized by the Portuguese authorities, which was the loss sought to be recovered. It appeared that the voyage was performed under a charter party, which bound the vessel to return from St. Michael's to London with a cargo of fruit, the importation of which, in an alien ship, except under a license from the crown, was prohibited. The ship and her freight were insured on the homeward voyage by a distinct policy. The counsel for the underwriters resisted the payment of the loss on the grounds,

that the voyage outward, and homeward, by the provisions of the charter party, was one and entire, and that this entirety could not be severed by a separate insurance of the two portions of the voyage; that the homeward voyage, with a prohibited cargo, being illegal, the illegality contaminated the whole adventure, and rendered the voyage insured illegal at its inception, and, consequently avoided the policy. The court, however, (the Common Pleas in England,) overruled the defence. Without determining, whether the voyage was, by the terms of the charter party, necessarily entire, they held, that the illegality of the homeward voyage was not a necessary consequence. It was not certain that the captain would have performed that voyage unless the necessary license had been obtained, nor did it appear to them that by the terms of the charter party, he was bound to perform it, unless it was rendered legal. He was not bound to pursue the voyage at all events, but would have been fully justified in its abandonment, if, before the return cargo was shipped, a license had not been procured. The verdict in favor of the plaintiff was therefore confirmed.(a)

§ 24. In this case the ultimate purpose of the outward voyage, the importation into England of a prohibited cargo, was illegal; but, as this illegality might have been cured, before the importation was complete, it was conditional, not absolute and necessary. It afforded no certain evidence, that the assured meant, at all events, to violate the law, and

(a) *Sewell v. Royal Ex. Assur. Co.*, (4 *Taunt.* 855.) Vide also *Gill v. Dunlap*, (7 *Taunt.* 204.) *Muller v. Thompson*, (2 *Camp.* 610.) *Holland v. Hall*, (1 *B. & A.* 153.) Note VI.

the decision would, therefore, have been harsh and inequitable, had it been allowed to vitiate his insurance. The same lenient and favorable construction, of the intentions of the assured, was adopted by the Court of King's Bench, in a case, to which I shall next refer.

§ 25. Until the treaty of commerce between Great Britain and the United States, concluded in 1795, the citizens of the latter were wholly excluded from any trade in the British possessions in the East Indies. It was, by that treaty, negotiated by a statesman(a) whose claims on the gratitude and veneration of his country are second only to those of Washington, that this trade, that has since become so extensive and lucrative, was first opened. Before this period, therefore, any voyage, direct or circuitous, from the United States, commenced with the ultimate design of proceeding to, and trading with, the British East Indies, must have been adjudged illegal by the courts in England, and all insurances thereon, when the original intent was manifest and absolute, have been declared to be void. An American vessel and her cargo were insured by several policies at and from *Bourdeaux* to *Madeira* and the *East Indies*, and thence to *America*. The vessel sailed from *Madeira* with the purpose of proceeding, with her whole cargo, to the British territories in the East Indies, and this voyage was commenced after the treaty had been ratified, and was in force; but it appeared, on the trial, that the ship left the United States with the original intention of proceeding to the East Indies by a circuitous voyage, and that

(a) John Jay.

she sailed before the ratifications of the treaty had been exchanged. Among other objections to the recovery of the plaintiff, the counsel for the underwriters insisted that the voyage from the United States to the East Indies, although circuitous by the way of Bourdeaux and Madeira, was entire, and that being illegal in its commencement, it was so throughout, so that no insurance upon any part of it could be valid. Lord Kenyon, in delivering the judgment of the court, while he fully admitted, that, where there is a *legal infirmity, in any part of an integral voyage, it renders the whole illegal*, so as to prevent a recovery, even on a separate policy, upon any part of it, yet remarked, that the argument built upon that principle, as applied to the particular case, was too refined. It was true, the treaty was not concluded, when the vessel left the United States, but it was known to be in agitation, and, probably, the captain came to Europe, with a view of carrying on the voyage to the East Indies, under the treaty, when concluded. There was, moreover, no certain evidence, that the ship left the United States with the intention of going to the British East Indies at all. What was the precise voyage then contemplated, did not appear. The proof only showed a general intention to proceed to the East Indies, and the voyage intended might have been to a territory, or port, of some other power than Great Britain, and consequently, would not have been an infraction of English laws. His conclusion was, that the voyage insured was legal, the grounds relied on to impeach its legality, at its inception in America, being wholly insufficient. (a)

(a) *Wilson v. Marryatt*, (8 Term, 3.) S. C. in Error (1 B. & P. 430.)

§ 26. The case I have last cited, did not turn solely on the objection that has been stated. It involved an important and difficult question, as to the true construction of that clause of the treaty, by which the citizens of the United States were admitted to the East India trade. That question has no direct relation to our present subject, yet, I feel it a duty, to advert to its unanimous decision, by the judges of England, as affording a striking evidence of their scrupulous good faith, and high sense of national honor. It was ingeniously and forcibly contended, by the counsel for the underwriters, that the only trade, which, by the terms of the treaty, was meant to be opened to American citizens, was a direct trade, to and from the United States, and, consequently, as the voyage insured was from *Bordeaux and Madeira*, it was unprotected by the treaty, and necessarily illegal; nor is it possible to deny that this construction was much favored by the words of the treaty, as well as recommended by obvious reasons of national interest and public policy.^(a) It was, however, rejected by all the judges; and, in delivering the judgment of the Exchequer Chamber, affirming that of

(a) By the words of the treaty, the trade to which the citizens of the United States were admitted, was described as a trade *between* the British territories in the East Indies and the United States, and Mr. Rouse, the counsel for the underwriters, whose argument, the court said, was "ingenious and well supported," contended that the word "between," by its necessary force, limited the trade that was opened to a direct trade, and excluded a circuitous, and he referred to the "Divisions of Purley," of Horne Tooke, (Pt. 1, p. 404, ed. 2,) to show, that, by its etymology, such was its meaning and effect. He also contended, that this literal interpretation was, probably most consonant to the intentions of the framers of the treaty, since it was necessary, in order to secure a fair and due preference to the great national commerce of the East India Company.

the King's Bench, C. J. Eyre expressed himself in terms that deserve to be recorded and remembered. "Whether the trade," he observed, "should have been conceded under any qualifications or restrictions, is one thing ; it having been conceded, now, to attempt to cramp it by a narrow, rigorous, forced construction of the words of the treaty is another, and a very different consideration. We cannot suppose, that an indirect advantage was intended to be reserved to the East India Company, by so framing the treaty, that the American trade might, by construction, be put under disadvantage, because this would be a chicanery unworthy of the British government, and contrary to the character of its negotiations, which have been at all times distinguished for their good faith to a degree of candor, which has been supposed sometimes to have exposed it to the hazard of being made the dupe of more refined politicians. The nature of the trade granted, in my opinion, fixes the construction of the grant."—"From the context, it appears, that the trade was to be free, subject only to certain specific regulations."

§ 27. The cases that have been cited under the present head, suggest some important topics of inquiry. They certainly establish, that where an entire voyage is illegal, at its inception, the illegality runs through and infects every part of it, so that in considering the question, whether an insurance on the voyage is valid, it is immaterial, whether the policy embrace the whole, or only a distinct and separate portion ; but it is to be regretted, that they do not define the facts or circumstances that must exist to render the voyage entire, and that it is only by inference—an inference, however, ap-

parently not doubtful—that these are to be collected. To constitute a voyage, consisting of distinct and separable parts, integral and entire, a certain connexion between those parts must necessarily subsist, and this connexion, it seems, may arise, either from the nature of the contract under which the voyage is prosecuted, or of the instructions to the master at its commencement, and his consequent duty. Thus, where the vessel is bound by the terms of a charter party, or other analogous contract, to pursue, *at all events*, a designated voyage, however numerous may be the designated ports, the voyage is entire; and this entirety even comprehends the return voyage, when that is embraced in the contract. (a) So the voyage is *entire*, when a ship destined to several ports in succession, leaves her home port with positive instructions as to the ports she is to visit, and the course of trade to be followed in each. (b) Hence, it may be stated as a general rule, that when the plan or scheme of a circuitous or successive voyage is, at its commencement, fixed and definite, and, so far as depends upon the will of the master of the ship, unalterable, this unity of the original design, whatever may be the nature of the proof by which it is evi-

(a) *Sewell v. Royal Ex. Assur. Co.*, Sup. It is not meant to be intimated that distinct voyages may not be covered by a charter party, even when a gross sum is to be paid for the hire of the vessel. Thus, should a ship be chartered for two successive voyages, from New-York to Liverpool, the outward and homeward passages of each, might well be considered as an entire voyage; but the two full voyages would hardly be considered as parts of one whole. I apprehend that an entire voyage is terminated in all cases, by the return of the vessel, to her original port of departure. Such is certainly the understanding of merchants and insurers, and I think, such would be the legal construction.

(b) *Wilson v. Marryatt*, Sup.

denced, connects together all the parts of the voyage, however separable in themselves, and seemingly independent, and consolidates them into one whole ; and that, in such cases, if the ultimate, or any intermediate, purpose of the voyage be unlawful, the illegal intent, subsisting at its inception, communicates an illegality to its successive parts, that endures with an undiminished force to its termination, and vitiates every contract designed for its entire or partial protection.

§ 28. But successive voyages are not to be bound together, as parts of an integral, if previous to the commencement of the first, the order, in which they are to be performed, and the objects, in the prosecution of each, are not embraced in a general and definite plan. When these are left to depend upon contingencies—when it is meant that they shall vary according to existing circumstances, or the discretion, at the time, of the master of the ship, the voyages thus separated in design, there is no reason to doubt, are distinct and independent in law.

Should a ship leave New-York for New-Orleans, with instructions to the master to seek there the best freight to be obtained, without restriction as to ports or cargo, the voyage from New-York, and the subsequent voyage from New-Orleans, would be evidently distinct, and the illegality of the former would never be permitted to invalidate a separate policy upon the latter ; although should both voyages be embraced in a time policy, the entirety of the contract, if void at the inception of the risks, might lead to a different result. But when successive voyages are neither bound together by the original design, nor by the nature or terms of the policy,

the illegality of a preceding, will not be communicated to those that follow, so as to bar, in any case, the remedy of the assured. The illegality, in order to avoid the policy, must exist or arise in the course of the voyage insured, or of that of which the voyage insured, is a necessary component part.

§ 29. An insurance was made in England on goods in an American ship on a voyage at and from Canton to Hamburgh or Copenhagen. It appeared in evidence on the trial, that the vessel sailed originally from *London* to *Bombay*, there disposed of her cargo, and took on board, under a license from the governor and council, a cargo of cotton for *Canton*. The license from the governor and council, was admitted to be void, and, consequently that the voyage from *Bombay* to *Canton*, as contrary to the provisions of the navigation act, and the treaty with the United States, was illegal. After the arrival of the ship at *Canton*, the goods insured were purchased, partly with the proceeds of those brought from *Bombay*, and were then shipped for *Hamburgh*. The ship, on the voyage to *Hamburgh*, was captured by a French privateer, and both ship and cargo were afterwards illegally condemned in France. It was found by the jury, that the voyage to *Canton*, and that from *Canton* to *Hamburgh*, were separate and distinct. The counsel for the underwriters resisted the payment of the loss, upon several grounds:—
1st. That the goods insured were purchased with the proceeds of the illegal cargo, brought from *Bombay*, and the adventure from *Canton* was, therefore, contaminated by the antecedent illegal traffic.
2d. That the voyage from *Bombay* to *Canton*, was only part of a larger voyage out and home, from

London to Canton, and from Canton to Europe, and that, as the ship, in the course of the voyage, traded at Bombay, contrary to the treaty between Great Britain and the United States, by not returning directly from Bombay to America, the whole voyage was illegal. 3d. That the ship was seizable, for a violation of the navigation act, in the voyage from Bombay to Canton, and consequently, that the risks were unduly increased by the goods not being put on board a proper ship, as the right of seizure continued, at least, during the time the ship was on the high seas, and until her return home. And lastly, that the American character of the ship was negatived by the sentence of condemnation; an objection, that, in this discussion, is not necessary to be further noticed. The Court of King's Bench overruled all the objections, and determined that the plaintiff was entitled to recover. In delivering his judgment, Lord Kenyon, C. J., said—"The arguments urged, by the defendants' counsel, have not convinced me that this contract is illegal, because the goods insured were procured with the proceeds of a former illegal cargo. If this objection were well founded, it would go to an alarming extent. In deciding on a claim, made on a policy of insurance, it would be necessary to examine and scrutinize the past conduct of the assured, in order to see, whether or not, by their former transactions in life, they had illegally acquired the funds with which the particular goods insured were purchased; but we cannot enter into considerations of that kind; we must confine ourselves to the immediate transaction before us. And whatever may have been my former opinion upon the facts of this case, the jury have relieved

us from one consideration, by finding expressly, as a fact, that these were not two connected parts of one voyage, but that the voyage homewards from Canton, was a separate and distinct voyage from that to Canton. The homeward voyage, therefore, cannot be affected by the former outward voyage." Mr. Justice Lawrence remarked, in reply to the objections that the plaintiff could not recover, because the goods were bought with the proceeds of an illegal cargo, and because the ship was liable to be seized. "We cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods. If the money were obtained by robbery on the highway, and invested in the purchase of a cargo, I do not know why that cargo may not be legally insured.(a) In order to render the insurance illegal, the illegality should exist during the course of the voyage insured. Nor do I think that the objection, that the plaintiffs cannot recover, because the ship was liable to be seized, is well founded. Here the illegality commenced, by the captain taking on board a cargo at Bombay, in order to carry it to Canton for sale. But the doctrine relied upon by the defendant, is perfectly new, that the assured cannot recover on the policy against the underwriters, because the ship, in a prior voyage, had been guilty of some transgression, for which she was liable to

(a) This language seems strong. The same doctrine, however, was explicitly laid down by Buller, J., in *Bell v. Gilson*, (1 *Bos. & Pull.* 353,) where he says, "I will suppose that the party has stolen these goods, and that, being in possession of them at the time of the policy made, he wants to bring them home, the underwriter will have no right to go into the state of the property previous to the time when he insured."

be seized. That is not a risk within the policy, and if the ship had been seized for this cause during the voyage insured, the underwriters would not have been liable.”(a) This case, as an illustration of principles, seems to have a peculiar value, and the opinions of the judges are expressed with a remarkable brevity, perspicuity, and force. It is for these reasons that I have departed from my usual plan, in the full statement that has been given.

§ 30. There was a suit between the same parties, and decided at the same time, upon a policy upon the ship for the same voyage, in which, it was determined, that the assured could not recover. The grounds of the decision were, that the policy “at and from,” attached directly on the arrival of the ship at Canton, and while the illegal cargo brought from Bombay was still on board, and that the illegality arising from this cause, as the risks of the policy were not divisible, vitiated the entire contract. This decision, although made by the admission of the counsel for the underwriters, seems to have carried the doctrine of a constructive illegality to its utmost limits of propriety. As the voyage from Bombay was ended when the policy attached, the effect of the decision, seems to be, that the illegality of a prior distinct voyage, is permitted to defeat a subsequent insurance; but the judgment of the court, and the admission of the counsel, are explained and justified by the obser-

(a) *Bird v. Appleton*, (8 Term, 662.) The rule laid down in this case, was adopted by the Supreme Court of New-York, in the case of *Kemble v. Rhineland*, (3 Johns. Cases, 130.) Vide also *Lockyer v. Offley*, (1 Term, 252.)

vation, that until the cargo from Bombay was landed and sold, the object of its illegal exportation was not completed—as long as it remained on board, it was in an illicit commerce, that the ship was engaged. If the cargo had been landed and sold at Canton, and then laden in another ship, for a new voyage, an insurance upon that ship, would certainly not have been affected by the previous illegality of the cargo; and hence the inference of Mr. Marshall, that “when an illegal cargo is on board, but for an hour after a policy attaches, it will avoid the policy, and discharge the underwriters,”(a) seems to be expressed in broader terms than the decision warrants. It can only be true when the cargo retains its original illegality so as to render any subsequent disposition of it by its owners, or the master of the ship, an illegal act. It cannot be extended to a case where a purchaser, not at all concerned in the original illegal transaction, has acquired a new and valid title; and, probably, it is only in the sense I have explained, that Mr. Marshall meant his observations should be understood.

§ 31. The general position laid down by Lord Kenyon in one of the cases that has been cited,(b) that, “an infirmity in any part of an integral voyage, renders the whole illegal, so as to bar a recovery by the assured upon the policy on any part of it,” is to be understood with a necessary limitation. It is evident that his lordship referred, solely, to an illegality existing in the intentions of the assured at

(a) 1 Marshall, 74.

(b) *Wilson v. Marryatt*, Sup. Vide also, *Bird v. Pigou*, (2 *Selwyn's N. P.*, Phil. ed., p. 191.)

the inception of the voyage, and forming a part of its original plan. A subsequent illegality, arising wholly from subsequent causes, can never operate to render the contract void in its origin, so as to prevent a recovery, by the assured, for intermediate partial losses; although it undoubtedly discharges the insurers from all subsequent risks. It avoids the policy from the time that it occurs; but does not, by a retroactive force, annul the contract at the instant of its execution. I know of no case in which a contract, valid when made, is wholly defeated by a subsequent vice, and to admit the principle, would be contrary to the whole analogy of the law.

§ 31. A recent decision in the United States,^(a) if acknowledged as law, would establish the doctrine that a subsequent illegality, not contemplated or intended by the assured when the policy was effected, can never wholly defeat the insurance, even from the time it was committed or incurred. The only effect, according to this decision, is to exempt the insurers from any liability for a loss, of which the illegality is the immediate and proximate crime, whilst their liability for all losses, proceeding from other risks, remains unimpaired. But it is reasonably to be doubted, whether this doctrine, in the extent it has been stated, can be sustained upon authority or principle. I collect, as the necessary result from the English decisions, that where the voyage or trade, insured, becomes illegal after the risks have commenced, it loses wholly from that time the protection of the policy; and other considerations, independent of the decisions,

(a) *Clark v. Protection Ins. Co.* Sup. § 7, p. 319.

lead us to the same conclusion. If the authority of the laws is only to be maintained, by avoiding every contract, that tends to encourage their violation, this just and necessary policy is plainly violated, whenever the assured, who has wilfully embarked the property insured in an illicit trade, is permitted to recover a subsequent loss. A contract, under which such an indemnity may be claimed, whatever may be its date, is a contract that tempts and emboldens him to violate the law. (a) It is this tendency of an insurance that renders it illegal, and the law would be inconsistent with itself, if it failed to declare, that whenever the existence of the cause is disclosed, the effect must follow. If we look to the necessary consequences of the doctrine in question, they seem to preclude the possibility of its adoption. If admitted as law, it would follow, that should an American vessel, insured upon time, by a policy *valid* at its inception, subsequently turn pirate, or engage in the slave trade, the only consequence would be, that in the event of her seizure and condemnation, the insurers would not be liable ; but should she be lost by the perils of the sea, even in the prosecution of a voyage, with slaves on board, the courts of the United States would be compelled to decree to the guilty owners, the satisfaction of their loss.

§ 33. An interdiction of trade, however positive and absolute the terms of the law by which it is created, is to be reasonably construed, as intended to apply, solely, to an intentional and voluntary traffic. A trading that clearly appears to have been

(a) Note VII. *Chalmers v. Bell*, (3 Bos. & Pull. 604,) *Norville v. St. Barbe*, (2 New Rep. 434.) *Shifner v. Gordon*, (12 East, 296.)

the result of necessity and coercion, although contrary to the terms of a prohibitory law, is not considered to be a violation of its spirit and intent, and, consequently, is not permitted to vitiate an insurance upon a cargo, to the purchase or procurement of which it may have contributed. Nor is it requisite, that the necessity which is relied on as a justification of an apparent breach of the law, should be physical, or wholly inevitable. If it was only by a traffic, otherwise illegal, that the party, whose acts are impeached, could have saved his property from an immediate sacrifice and loss, the *moral* coercion, under which he acted, shields him from the penalties of the law, and repels the defence of his insurer.

§ 34. By a temporary act of Congress, passed in the year 1798, all American vessels were prohibited from proceeding to any port or place within the territory of the French Republic, or of any of its dependencies in the West Indies or elsewhere, and from being *employed in any traffic or commerce, with or for any persons resident within the jurisdiction, or under the authority of the French Republic*, and in the case that I am about to state, the underwriters rested their defence upon an alleged violation of these provisions. The insurance was on a cargo of coffee, on a voyage from Hispaniola to St. Thomas. The cargo was purchased and laden at Cape Francois, which, it was admitted, was, at that time, a French port, within the prohibition of the act of Congress. Apparently, therefore, the law had been violated, and the insurance was void. It, however, appeared in evidence, and the facts were so found by a special verdict, that the vessel, on board of which the goods insured

were shipped, had been compelled to put into Cape Francois, in distress, and that for the purpose of necessary repairs, her original cargo was there landed. That the French authorities seized a large portion of it, and prohibited the assured from relading the residue, and from disposing of it in any other manner than in exchange for the produce of the island; and the Supreme Court of New-York, after recapitulating these facts, observed, that they left no alternative to the parties, but to comply with the terms prescribed, or sacrifice the whole of their property. Their acts of trading were, therefore, acts of necessity and coercion, to which the law of Congress, which suspended all commercial intercourse with France and her dependencies, could not reasonably be construed to apply. They, consequently, held, that the assured were entitled to recover. This case, after passing through the Court of Errors of New-York, was carried by a writ of error to the Supreme Court of the United States, by which the judgment of the court below was unanimously affirmed. Upon the argument, the counsel for the underwriters contended, that the circumstances stated in the special verdict, did not show an absolute necessity for the trading described, since the assured, the plaintiffs below, might have abandoned the property, and sought redress of their own government, and that it was their duty to adopt this course, rather than violate the laws of their country. But the court were of opinion, that the act of Congress imposed no such terms upon a person, who had been forced by stress of weather to enter a French port and land his cargo, and had been prevented by the public officers of the port, from relading and carrying it

away ; and that, even had an actual war existed between the United States and France, the sale of the old and the purchase of the new cargo, would not, under such circumstances, have been deemed such a traffic with the enemy, as could have vitiated the policy.(a)

§ 35. We have seen, that, in many cases, a prohibited, or illicit trade, may be rendered lawful by a license from the proper authority ; but, in all such cases, if the terms, or conditions of the license, are violated by the assured, the voyage or trade to which it relates becomes illegal, and where it thus forfeits the protection of the license, as a necessary consequence, it loses that of the policy.

§ 36. Thus, where a license had been granted to the assured, by the East India Company, at a time when the acts of Parliament that secured to them the monopoly of the East India trade, were still in force, authorizing a ship to take on board a cargo of cotton at Bombay, for sale in London, but containing an express stipulation, that she should not be employed in any other trade whatever, within the chartered limits of the company, the breach of this condition by a traffic not authorized by the license, was held to make the voyage, both out and home, illegal, and was a complete bar to the recovery of the assured for a loss occurring from a distinct peril on the homeward passage.(b)

So, where a license that covered the voyage in-

(a) *Jenks and others v. Hallet and others*, (1 *N. Y. T. R.* 60. *S. C.* 1 *Caines' Cas. in Err.* 43.) *Hallet & Bowne v. Jenks and others.*, (3 *Cranch*, 210, 19.)

(b) *Camden v. Anderson*, (6 *Term*, 723. In error, 1 *Bos. & Pull.* 292. *Marsh.* 65.)

sured, out and home, contained a condition [that the licensee should export on the outward voyage, a certain proportion of British manufactures, and the proportion in fact taken was small and merely nominal, the greater part of the outfit consisting of Spanish goods, the fraud that vitiated the license, was held to avoid the policy.(a)

§ 37. But it is not a necessary condition of a license, that the vessel shall perform the whole voyage that it authorizes. Unless there is an express covenant, that she shall prosecute the voyage at all events, the authority to perform it is construed as a privilege, the exercise of which depends on the discretion of the assured. Thus, where a ship licensed by the East India Company, to proceed to, and trade at Canton, abandoned that port altogether, and was lost on her homeward voyage; as the voyage, though changed, was still covered by the terms of the policy, the underwriters were held to be liable.(b)

§ 38. Where a particular trade is prohibited, by the express terms of a treaty, to which the state, within whose jurisdiction the policy is effected, is a party, the effect of the prohibition, whether general, as to trade, or limited to particular commodities, I apprehend, is precisely the same as if it were created by a municipal law, an act of Parliament, or of Congress. Every voyage, in contravention of the treaty, is illegal, and every insurance upon such a voyage, whatever be the subject or terms of the policy, necessarily void.

Although, in England, some doubts may seem

(a) *Gordon v. Vaughan*, (12 *East*, 302, n.)

(b) *Norville v. St. Barbe*, (2 *New Rep.* 434.)

to rest upon this question, in consequence of a decision of Lord Mansfield,^(a) none can reasonably be entertained as to the law in the United States. By the constitution of the United States, a treaty is the supreme and paramount law, and as such, is binding, not only on the federal government, but on every state, and every citizen. An American court could with no more propriety legalize a trade which a treaty prohibits, than a trade interdicted by an act of Congress. To affirm the validity of an insurance upon such a trade, would be, in effect, to repeal the provisions of the treaty, and consequently would not merely be a violation of good faith, but of the terms and spirit of the constitution. Nor is the doctrine, that every subject, or citizen, is personally bound by the provisions of a treaty, binding on his government, the mere result of a just interpretation of our own constitution. It is the common doctrine of civilized nations, and, in truth, an essential part of that international law, that all acknowledge, and are bound to obey. Such is the declared opinion of Sir William Scott, whose authority upon all questions of public law, few, who have *studied* his decisions, will venture to impeach.^(b)

§ 39. An interdiction of trade is not always the result of a general and permanent law. It is not unfrequently a temporary restraint, having no relation to commerce or revenue, but imposed or enacted with a sole view to political objects. Such is the character of an embargo, general or special; a prohibition of the departure of all, or of particu-

(a) *Lever v. Fletcher*, (*Marsh.* 61. 1 *Park, Hild.* 506.)

(b) *The Eenrom*, (2 *Rob. Ad. R.* 6.) *The Neutralitet*, (3 *Rob. Ad. R.* 296.) Note VIII.

lar vessels from all, or some of, the ports of the country in which it is laid. This prohibition, whether limited to a certain period, or indefinite as to time, as it springs wholly from temporary causes, is always regarded as temporary in its nature. Hence it is construed as a mere suspension of the trade that it prohibits, not as a condemnation of the trade, as, in itself, unlawful; and this distinction has, in some cases, an important effect upon the construction of the policy.

As a general rule, the effect of a subsequent law prohibiting the acts necessary to the performance of a contract, already made, is to dissolve the contract without prejudice to either of the parties ;(a) but, from this rule, the operation of an embargo upon a subsisting policy, is an exception. Where the voyage, insured by a policy, *at* and *from* the port of departure, is rendered illegal before the policy has attached, by a law of revenue or trade, or the provisions of a treaty, the contract is annulled, without any right to the assured to claim an indemnity, or even, generally speaking, a return of premium; but the defeat of the voyage by an embargo *after* the policy has attached, is not considered as a dissolution of the contract, but as a loss by a peril insured against, entitling the assured, upon an abandonment, to a recovery of the whole sum insured. It is a total loss by an arrest or detainment of the government, and as such is covered by the express words of the policy. When it is certain that the embargo will be of short duration, the assured may elect to consider the voyage, not

(a) Salk. 198. Rolles' Ab. 451. Dy. 28. 1 Ld. Ray, 321. 1 Mod. 169.

as defeated, but suspended, and may resume its prosecution under the policy, when the temporary restraint is removed. (a) But, although the contract of insurance is not dissolved so long as the vessel remains in port, yet, should she sail, or attempt to sail, in violation of the embargo, this act of positive illegality, whether followed by a seizure or not, I cannot doubt, would avoid the policy, and discharge the insurers. That, in the event of a seizure, they would not be liable, is certain. (b)

§ 40. The rule, however, is not universal, that the defeat of the voyage, by an embargo, after the policy has attached, is a loss for which the insurers are liable. The rule applies, universally, where

(a) When the owners of a ship are bound, by the provisions of a charter party, to perform a certain voyage, which is prevented and suspended by an embargo, it has been solemnly decided that it is not merely their right, but their duty to prosecute the voyage when the restraint is removed. (*Hadley v. Clark*, 8 *Term*, 259.) Although a policy of insurance does not impose a similar duty upon the assured, his possession of a similar right seems a necessary consequence of the doctrine, that an embargo, while it suspends the execution, does not dissolve the obligation, of the contract. It is possible, however, that the discretionary power of resuming a voyage suspended by an embargo, is, in respect to an insurance, limited in its exercise, by the nature of the contract; and hence it is, that I have stated it to exist only when it is certainly known that the existing restraint will be speedily removed. A delay, altering or increasing materially the risks of the policy, might be reasonably held to discharge the insurers.

(b) Note IX. *Delmada v. Motteux*, (1 *Park*.) *Odlin v. Ins. Co. of Penn.*, (2 *Wash. C. C. R.*, 312.) *M'Bride v. The A. Ins. Co.*, (5 *Johns.* 209.) *Walden v. Phoenix Ins.*, (*Ib.* 310.) *Delano v. Bedford Mar. Ins. Co.*, (10 *Mass.* 349.) Vide, also, *Page v. Thompson*, (1 *Park*, 175.) *Visger v. Prescott*, (5 *Esp.* 184.) *Conway v. Gray*, (10 *East*, 536.) Opinion of Lord Ellenborough, *Rotch v. Edie*, (6 *Term*, 413.) *Pothier*, n. 59, 60. 1 *Emerig.* 541. 2 *Valin*, 134-5. *Roccus* n. 65. I do not abstract the authorities and cases on this subject in a separate note, as in treating of total losses and abandonment, they will hereafter be fully examined and made the topics of much observation. Their relation to the present subject is only incidental.

the parties to the contract are the subjects of the government by which the embargo is imposed, and to all cases, without regard to the national character of the parties, where the embargo is simply a measure of precaution, not of hostility; but where the assured is a foreigner, and the embargo is a measure of pure hostility—a measure of retaliation and reprisal, intended to operate as such upon the government of the country to which he belongs, he is never permitted to recover an indemnity for a loss it may occasion. No person is permitted to insure against the hostile acts of his own government. It is a risk that the terms of the policy, however broad or express, are not permitted to cover, and it can make no difference in the application of the rule, whether the risk be that of hostile detention or hostile capture.(a) What, however, is the precise effect of an insurance against a hostile risk, proceeding from the acts of the government of the insurer, is a question which the authorities have left in doubt. It is yet undetermined, whether the hostile risk puts an end to the entire contract, or merely exonerates the insurer from a loss it may occasion.(b)

§ 41. Where the assured is a foreigner, the operation upon the policy of an embargo, or other act occasioning a loss, proceeding from his own government, is a question attended with much difficulty. It will be hereafter fully examined, in its appropriate place. It does not belong to the present discussion,

(a) *Tonteng v. Hubbard*, (3 Bos. & Pull. 301.) Opinion of Lord Alvanley, C. J.

(b) *Glaser v. Cowie*, (1 M. & S. 54.) Opinion of Lord Ellenborough, C. J., *Lubbock v. Potts*, (7 East, 449.) *Barker v. Blakes*, (9 East, 283.)

which is limited to the effect upon the contract of the laws of the country where the insurance is made.

§ 42. The rule that a detention by an embargo, creates a total loss, is not applicable where the insurance is effected, whilst an embargo is in force. If, during the pendency of an embargo, an insurance is made upon a voyage that it prohibits, not only has the assured no right to consider the detention as a substantive loss, and a valid cause of abandonment, but the contract is in its origin, illegal and void, unless it clearly appear from the terms of the policy, or by other evidence, that the voyage was not meant to be prosecuted until the restraint of the embargo had been removed. Where the presumption is not repelled, that the object of the policy was to protect a voyage in violation of the embargo, the insurance is certainly void, and in such a case, even should it appear that the voyage was not in fact commenced until the embargo was dissolved, the insurers would not be liable. When the law annuls a written contract, at the instant of its execution, no subsequent act of the parties, other than an agreement in writing, can give it a legal existence.

§ 43. It has been determined by the Supreme Court of New-York, that the breach of an embargo, like that of an interdiction of trade, must be intentional and voluntary, in order to charge the assured with its legal consequences, as a criminal act. The celebrated act of Congress laying a general and unlimited embargo, was passed on the 22d of December, 1807, but intelligence of its passage did not reach the collector of the port of New-York, until the morning of the 25th of that month. In consequence of this intelligence, he, on that day,

arrested and detained a ship that had sailed a few hours before, but was still within the limits of the harbor. The ship was insured, and a total loss, as resulting from her detention, was claimed from the underwriters, who resisted the payment chiefly on the ground, that the vessel had commenced her voyage in violation of the embargo. As it did not appear, from the facts in evidence, that an actual knowledge of the existence of the law could be justly imputed to the owners or master of the ship, the objection was overruled and judgment given for the assured.(a)

It is plain, that this decision establishes an important exception to the general rule, that a person who has violated a law is not permitted to aver his ignorance of its existence. The exception is most equitable in itself, and would probably be construed to embrace all cases where the existence and provisions of a prohibitory law, from the recency of its passage, were generally unknown at the place where the acts, involving its violation, are proved to have been committed. To such cases, the legal presumption of a knowledge of the law, by the person violating it, might justly be held not to apply, and the burthen of proving his actual knowledge be thrown upon the party alleging it.

§ 44. In England, the power of the crown to lay an embargo, is limited to a state of war. In peace, it can only be imposed by an act of Parliament.(b) In the United States, every embargo, in time of peace, and at all times, a general embargo, must

(a) *Walden v. The Phoenix Ins. Co.*, (5 *Johns.* 310.) Vide Note IX.

(b) Lord Mansfield, in *Delmada v. Motteux*, (1 *Park*, 8th ed. 504.) Note IX.

proceed from the authority of Congress ; but, in time of war, it is reasonable to believe, that a special embargo for a definite period may be declared by the sole authority of the president. In the prosecution of a war, such a measure is often necessary, or highly expedient, and the right of the president to adopt it, seems to flow from the general authority of the executive over the conduct of the war.(a)

§ 45. 3. We are now to consider, what is the effect on the legality of the voyage, and the consequent validity of an insurance of the breach of a statutory regulation, which has no relation to the nature of the trade, but applies solely to the conduct, equipment, or mode of navigation of the vessel.

§ 46. The navigation act of 6 Geo. IV., c. 109, in declaring the necessary requisites of a British ship, provides, among other things, that every such ship shall be navigated, during the whole of any voyage, by a crew, of which at least three-fourths shall be British seamen ;(b) and, in a case upon a policy of insurance, which turned mainly upon the construction of this statute, it was admitted by the counsel, and in effect, decided by the court, that if the provisions as to the character of the crew, had been wilfully violated by the owners, or master of the ship, the voyage insured was illegal, and the underwriters discharged from the loss. It appeared, however, in this case, that the ship, which was insured from Sierra Leone, to a port of discharge in

(a) 3 Story's Com. p. 340, 6, 7. 1 Kent's Com. 5th ed. sec. 13, p. 281, Note X.

(b) 6 G. IV. c. 109, § 12, 18, 19.

the United Kingdom, was duly navigated when she left England, and in the outward voyage ; that the number of her British seamen was reduced by death, after her arrival at Sierra Leone, below the proportion required by statute, and that she was there unable to replace them, except with foreigners ; and these circumstances being proved to the satisfaction of the jury, it was held by the court, that they were sufficient to exempt the vessel from the operation of the statute, and to sustain the validity of the insurance. The insurers were, accordingly, bound to satisfy the loss.(a)

§ 47. The decision of the Court of King's Bench in this case, was partly founded on some special provisions, which it is unnecessary to recite, in the act of Parliament ; but the judges all concurred in the opinion, that the statutory regulation alleged to have been violated, although, in its language, absolute and unqualified, was to be understood with a virtual exception of the cases, in which, a compliance with its terms was prevented by the act of God, or inevitable necessity ; and this principle is, doubtless, to be applied to the construction of every statutory provision of a similar character ; nor does it seem to be requisite, that, in such cases, the impossibility which is to excuse a non-compliance with the law, should be physical and absolute. It is enough, that a compliance is impossible, in the usual and reasonable sense of the word, and this exists and applies, where the duty that the law enjoins cannot be performed without a sacrifice or loss, to

(a) *Suart v. Powell*, (1 B. & Ad. 266.)

which no reasonable man could be expected to submit. (a)

§ 48. During the period that the slave trade was still tolerated by the laws of England, it was subjected to many strict and wholesome regulations, and among them, it was provided, 'by an act of Parliament, (b) that no person, not possessing certain qualifications, which the statute specially described, should take, or have the command or charge of any ship or vessel, clearing out from a port of Great Britain for the coast of Africa, with a view to the purchase and transportation of slaves, and a heavy penalty was imposed upon every master, not thus qualified, and upon the owners employing him; but it does not appear, that, by the terms of the law, the vessel under his command, was liable to seizure and forfeiture. Some of the qualifications thus required of the master, were to be evidenced by a certificate, attested by the respective *owner or owners*, but whether the persons meant were the owners of the vessel he was then to command, or of those in which he had formerly sailed, the words of the act left uncertain. In an action on a policy upon a slave ship, the loss claimed, which arose from an insurrection of the slaves, was resisted by the un-

(a) Mr. J. Bayley, after remarking that a ship, having lost a portion of her crew, is entitled to all the privileges of a British ship, until the due proportion of seamen can be made up, added—"It is so in the present case; the number is reduced by the act of God, and at Sierra Leone, it is impossible to supply the deficiency; not physically, perhaps, but in a reasonable view, impossible. The master is obliged to make up the proportion if he can, on reasonable terms, but is not bound, at his peril, to give such as are grossly unreasonable, and which no man alive would think of offering." Vide also, the *Betty Cathcart*, (1 *Rob. Ad.* 220.) Note XI.

(b) 31 G. III. c. 54. Continued by 32 G. III. c. 52.

derwriters, on the ground, that the voyage was illegal, the certificate of the master being signed by his present, and not by his *former* owners, as the statute, it was contended, in its true construction, required. The Court of King's Bench adopted this construction of the statute, and confirmed the nonsuit of the plaintiff. Thus the mistake in the attestation of the certificate, or, legally speaking, the want of the necessary certificate, it was held, rendered the voyage illegal, and avoided the policy. (a)

§ 49. At the first view, this decision seems harsh and unequitable. There was, plainly, no intention to violate the law. The mistake in the form of the certificate, arose from a very pardonable error in the construction of the statute—an error, that was proved to be extensive and general—yet, in truth, construing the law as they did, the court could have made no other decision. A mistake in the construction of a law, can never be admitted as a valid excuse for its violation. The frequency of an excuse so easy to be alleged and difficult to be repelled, would operate as a virtual repeal of the law. The plea of a partial error is no more admissible than that of an entire ignorance; each may be true, and when true, the one is just as equitable as the other; but the same imperative reasons of public policy exclude them both. Either may be justly considered by a Chancellor of the Exchequer, or a Secretary of the Treasury, as a sufficient ground for the remission of penalties; but to neither can a court of justice, with propriety, listen.

(a) *Farmer v. Legg*, (7 Term R. 182.)

§ 50. It is not in all cases, that the breach of a statutory provision, by the owners or master of a vessel, even when it induces a forfeiture, by a necessary consequence, avoids the insurance. Its influence upon the contract depends on the nature, consequences, and design of the prohibition. We have seen, that an illegal traffic is never permitted to vitiate the contract, unless it occur in the course of the voyage insured, or of an entire voyage, of which that insured is a component part. By parity of reasoning, the statutory provision, the breach of which discharges the insurers, must bear a direct and immediate relation to the voyage insured. It must operate, either by its terms, or by a necessary inference, as a prohibition of the voyage. Where no such connexion subsists between the actual voyage and the provisions of the statute; where, consequently, the relation between the illegal act and the policy, is not direct, but remote, and incidental, so that neither the design or tendency of the latter is to aid or promote the commission of the former, the validity of the contract is not impaired or affected. In each of the cases that have been cited, (a) the statutory provision, alleged to be violated, bore a direct relation to the voyage insured. It was, in effect, a prohibition of the voyage, unless performed with the crew or master that the law required. Hence, the insurance shared, of necessity, the illegality of the voyage to which it referred. But it is obvious, that the acts inducing a forfeiture, or other penalties, may be wholly unconnected with the particular voyage. They may not

(a) *Suart v. Powell*, and *Farmer v. Legg*.

expressly or impliedly render the voyage illegal, and in such cases, although the insurers are certainly not liable, in the event of the seizure of the vessel, (a) they continue liable for all risks that their contract properly embraces. A case that has occurred in the United States, will furnish a clear illustration of these remarks.

§ 51. By an act of Congress—the registry act of 1792, (b) it is provided that when any ship or vessel, before registered, shall be built upon, or altered, in her form, dimensions, or denomination, she shall be registered anew, by her former name, and her former certificate of registry be delivered up to be cancelled, and for the omission to surrender the former certificate, a pecuniary fine is inflicted upon the owners ; and by a subsequent section it is declared, that if any certificate of registry shall be fraudulently or knowingly used for any ship or vessel, not at the time actually entitled to the benefit thereof, such ship or vessel with her tackle, apparel, and furniture, shall be forfeited to the United States.

In a case that came before the Supreme Court of the United States, on a writ of error, to the Supreme Judicial Court of Maine, it appeared that the vessel, which was insured by a time policy for a year, before the policy was effected, had been built upon and altered, and a new certificate of registry obtained for her by a new name, her former certificate not being delivered up to be cancelled, as the statute required, and it was insisted by the underwriters, that these facts subjected the vessel

(a) *Bird v. Appleton. Lockyer v. Offley: Sup.*

(b) *Laws of 1792, c. 45, § 14—29. 1 Story's Laws U. States, 276. 281.*
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to forfeiture, and rendered her subsequent voyage, which was covered by the policy, and in which she was totally lost, illegal; and by avoiding the insurance, exonerated them from the loss. It is by no means evident, that the circumstances thus relied upon, were sufficient to bring the vessel within the penalties of the statute, but Mr. Justice Story, in delivering the judgment of the Supreme Court, intimated a very clear opinion, that even on the supposition that the law had been violated, and the vessel forfeited, it was far from being a necessary consequence that the insurance was void, and the underwriters discharged; and he stated as the grounds of this opinion, that the connection between the illegal use of the certificate and the policy, was too indirect and remote, to justify the belief that the design or effect of the contract, was to assist or encourage a violation of the law. The question, however, was not positively decided by the Supreme Court, as the writ of error was dismissed for want of jurisdiction; but the very dismissal implied that the decision against the underwriters in the court below, if founded upon the reasons that have been stated, might well be supported.(a)

§ 52. It is to be observed, that the statutory provision in this case, has no special or direct bearing upon any voyage of the vessel. It does not prohibit the sailing of the vessel, with a certificate of registry to which she is not entitled, thereby rendering the voyage illegal. The prohibition is general—it applies and attaches the forfeiture, to all

(a) *Ocean Ins. Co. v. Polleys*, (13 *Pet.* 157.) Note XII.

acts constituting an unlawful use of a certificate of registry by a vessel not entitled to its benefit, and such acts may as well be performed on land as on the ocean. Indeed, if in the particular case, this prohibition had been violated at all, it was so by the very act of obtaining the certificate, so that the vessel was liable to forfeiture when the insurance was effected. It was not possible, therefore, to avoid the policy upon this ground, without contradicting the established rule, that a subsequent insurance is never affected by a prior and distinct illegality.(a)

§ 53. Nor is it only in the cases and upon the grounds that have been stated, that the breach of a statutory provision is held not to discharge the underwriters by invalidating their contract. The prohibition of the statute may be immediately connected with the voyage insured; the illegal acts or transaction relied upon as a defence, may have taken place in the course of that voyage, and yet there are cases in which the underwriters are justly held to be responsible for a loss, not occasioned by a violation of the law, but proceeding from a distinct peril. Where the prohibition of the statute does not apply to an act in itself immoral, and is not founded upon any reasons of public policy, but is designed solely for the benefit of particular individuals, without affecting the general welfare, it is only those for whose protection or convenience it was passed, who are entitled to complain of its violation. The prohibition of the act is not then construed as a prohibition of the voyage that by

(a) *Bird v. Appleton.* Sup. § 29.

rendering it illegal vitiates the policy. So, where the statutory provision, although sanctioned by a penalty, may be reasonably construed as merely directory, and not as intended to invalidate or render unlawful even the acts to which the penalty applies, its violation has no effect upon the contract of the insurers, and in no respect weakens their liability.

§ 54. An act of Congress, for the government and regulation of seamen in the merchant's service, contains a section, declaring that every American ship bound on a voyage across the Atlantic ocean, shall have on board at the commencement of the voyage, a certain number of gallons of water, *well secured under deck*, for each person on board, and it gives to the crew of every vessel not so provided, if put upon short allowance, a remedy for increased wages against the owners and master.^(a) In a case before the Supreme Court of Massachusetts, in which it appeared that the vessel insured had sailed with all her water on deck, but was admitted not to be unseaworthy on that account, the counsel for the underwriters contended that the statute in requiring the water to be under deck, was imperative; and that, by its violation, the policy had ceased to be binding, and he insisted that the provision was not to be construed as designed, solely, for the protection of seamen, but was founded upon reasons of public policy, having an intimate relation to the prosperity of the maritime interest. But the court overruled the defence. In giving their judgment, Wilde, J., remarked (*inter*

(a) Laws, 1790, c. 56, § 9. 1 Story, 106. Vide, also, Act of March 2, 1819, which contains a similar provision for the benefit of passengers.

alia) that, although the general principle was well established, that a contract, founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing, that is prohibited by statute, or to aid or assist any party therein, is void as against the policy of the law ; yet, like all general rules, it was subject to exceptions, and that, one of these exceptions embraced the case then before them. That the rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute, on the ground of public policy ; but that, when the contract is founded on a transaction which is prohibited for the benefit of a particular individual or individuals, and has no influence on the public welfare, it is not absolutely void, but only voidable by the party for whose benefit the prohibition is introduced. That both on the authority of former cases and upon principle, the court were very clear, in the opinion, that the voyage, insured, was not rendered illegal by reason of the non-compliance with the statute, nor the vessel, on that account, unseaworthy. That the provisions of the statute, being intended for the benefit of the crew, were to be construed as merely directory, and that their violation was not meant to be followed by any other consequence than the penalty imposed upon the owners and master.(a)

§ 55. Although the principles so luminously stated by the learned judge, who, on this occasion, was the organ of the court, command our immediate and entire assent, it is, by no means, so evident, that they were justly applicable to the

(a) *Warren v. Manuf. Ins. Co.* (13 Pick. 518.)

case under judgment. It may be reasonably doubted, whether the salutary provisions of the statute, that in this case, were so grossly violated, instead of being construed, as intended for the sole benefit of individuals, are not, in truth, to be regarded as founded upon cogent reasons of public policy, and therefore, as obligatory, in the most absolute and extended sense. Regulations, having for their object the preservation of the health and lives of seamen, seem to be inseparably connected with the general interests and prosperity of commerce, and cannot, therefore, be truly described as having no "influence on the general welfare." Their tendency, where the regulations themselves are wise and salutary, to promote the good, not merely of the individuals, for whose immediate benefit they were designed, but that of the whole community, seems undeniable. Certainly, the most effectual mode of securing the obedience of ship-owners and masters to these provisions of the existing laws that regard the health and safety of seamen and passengers, is to avoid every insurance upon every voyage in which these important regulations are wilfully violated; nor are there many cases to which, the doctrine of the constructive illegality of the policy, can be more beneficially applied. It is true, that the words of the statute, in the case decided, do not declare, that no American vessel, not furnished and provided in compliance with its directions, shall *proceed on her voyage*, but it is believed, that the terms used are of equivalent import. A positive direction, always, implies a positive prohibition of the acts by which it is violated.(a)

(a) Vide *Bensley v. Bignold*, (5 B. & Ad. 335.) In the case of

§ 56. There is a previous decision of the Supreme Court of Massachusetts, to which, as immediately connected with the present subject, it is proper to advert. The insurance was made during the last war with England, on a cruising voyage of a private ship of war, and the defence was, that the master, during her cruise, and previous to the loss claimed, had broken open some of the vessels captured, and taken from them a part of their cargoes, before condemnation. It was insisted, that this conduct of the master was not only a gross violation of the law of nations, but was contrary to the express injunctions of a statute of the United States,^(a) and that its legal effect was to vacate the policy and discharge the insurers. The court were, however, of a different opinion. They held, that the provisions of the statute did not render the act of taking enemies' property, from captured vessels, unlawful, so as to entitle the owners to its restoration. The law was merely directory—if violated, the master would be liable to punishment, and the bond which the statute required to be given by his owners would be forfeited, but that these were the only consequences that it was intended should follow.^(b)

§ 57. Although the preceding cases differ wide-

Farmer v. Legg, Sup. § 48, it might have been said, that the provisions of the statute, prescribing the qualifications of the master, were not founded on any reasons of public policy, but were prompted by motives of humanity, and intended for the sole benefit of the slaves; and had the court of King's Bench adopted the same reasoning as the Supreme Court of Massachusetts, they must have held the insurance to be valid; as it is, the decisions seem not easy to be reconciled.

(a) Laws of 1812, c. 107, § 6. 2 Story's Laws of United States, 262.

(b) *Ward v. Wood*, (13 Mass. 539, 546.)

ly in their form and circumstances, the decisions rest substantially on the same principle, that, where the breach of a statutory provision, neither by the terms of the law nor by judicial construction, renders the voyage illegal, it does not affect the contract or liability of the insurers. The decisions, therefore, do not impeach the truth, or narrow the operation of the general rule, that where the voyage insured is *illegal*, either from the character of the goods transported, the nature of the trade, or the violation of a domestic statute, the illegality is communicated to every contract, designed, in whole or in part, for its protection.

§ 58. A few general observations will close the present discussion. To avoid an insurance upon a prohibited trade or voyage, it is not at all necessary that the illegality should appear on the face of the policy. In most of the cases that have occurred, the illegal acts or design were clearly proved or fairly collected from the facts in evidence, and were unknown to the insurers when the policy was effected. When there are no grounds for imputing to the insurer a knowledge of the illegality, his own rights, as against the assured, are not affected by the invalidity of the contract. The assured would never be permitted to set up his own personal acts, in violation of the law, to prevent the recovery of the stipulated premium, by an innocent insurer. But, where the illegality of the voyage or trade, meant to be protected, is apparent from the terms or nature of the policy; or the knowledge and privity of the insurer, are established by extrinsic proof, the parties, in judgment of law, are in *pari delicto*, equal sharers in the offence; and the illegality, actual or designed, is just as effectual a

bar to a recovery of the premium, by the insurer, as of a loss under the policy, by the assured.(a) It has been decided by an eminent judge, that in order to defeat an insurance, it is not necessary that the illegality of the trade it is meant to cover, should be absolute and certain. When it depends upon a contingency, but it clearly appears to have been the intention of the parties, that the trade, whether legal or illegal, whether authorized by law, or carried on in defiance of its provisions, should be protected by the policy, the contract is void. The assured can neither recover a loss, nor the underwriter his premium.(b)

§ 59. A few weeks before the famous non-importation law, which forbade the importation of any goods or commodities whatever from Great Britain or any of her colonies or possessions, was, by its terms, unless prevented by a prior repeal of the British orders in council, to go into full operation and effect, an insurance was made on a vessel to cover her outward and return voyage from Philadelphia to Madras and Calcutta. The vessel sailed and returned in safety ; but when she left Calcutta, with a return cargo, there laden, the non-importation law was in force, and continued to be so when she arrived in the United States. The vessel and cargo were, in fact, seized by the government for a violation of the law ; but, for reasons that do not appear, were subsequently released. The action in which the decision, to which I have referred, was made, was brought by the underwri-

(a) *Russel v. Degrand*, (15 *Mass. R.* 35.) Note X. *Craig v. U. S. Ins. Co.*, (1 *Pet.* 417.)

(b) *Gray v. Sims*, (3 *Wash. C. C. R.*, 276.)

ter for the recovery of the premium of insurance upon the whole voyage, and its original illegality was relied on as a conclusive bar to his claims.

§ 60. Mr. Justice Washington, in delivering the judgment of the court, observed, that where the commerce in which a vessel is to be engaged during the voyage insured, is prohibited by the laws of the country where the insurance is made, a policy upon the ship equally with that upon the cargo, the peculiar subject of interdiction, is void. It is true, that the insurance upon the ship is strictly an insurance upon the voyage, which, independent of the traffic in which she is engaged, may be perfectly lawful; but if the traffic be forbidden, the voyage connected with such traffic, becomes, on that account, unlawful. The voyage is identified with the trade, for the sake of which it was undertaken, and when the real intention of the voyage can be discovered, either by the nature of it, or by other evidence, and the object appears to be an illicit trading, the legal consequence will be the same as if it appear on the face of the policy. The material question, he proceeded to remark, was, whether the rules he had stated, applied to the policy under consideration, which was underwritten a few weeks prior to the 2d of February, 1811, and before the non-importation law came into operation against Great Britain. That the difference between a policy made before, and one made subsequent to this period, was, that in the latter case, the subject of the contract was immediately and absolutely illegal, but in the former, it depended on a contingency. But, nevertheless, the underwriter, in this case, promises to the assured, an indemnity against a loss upon a traffic, which the laws of his

country may forbid, and *whether it should be forbidden or not*. He engages to protect a trade, which is to be carried on in defiance of any law that may be passed to interdict it. And is this a contract, the learned judge, emphatically, asked, which can show its face in a court of justice, whose duty it is, to enforce the laws of the country? Upon these grounds, the jury were charged, that the policy being void in its origin and design, the plaintiff was no more entitled to recover the premium, than the defendant would have been to recover a loss; and their verdict was rendered in conformity to the charge.(a)

§ 61. The doctrine on which this decision proceeded, is evidently laid down in broader terms than the facts required. Applied to the particular case, it was perfectly just; but, in order to be received as a general rule, it seems necessary that it should be understood with some modifications, that, although not expressed, were doubtless implied in the mind of the court. It was the plain intention of the parties in the case decided, to cover a trade, in violation of an existing law; for the non-importation act, although suspended in its operation, was a subsisting law when the policy was effected. The only contingency, therefore, to which, in making their contract, they could have looked, was, not that the trade meant to be protected, would be interdicted—for it was so already—but that it might be legalized; a contingency which, as it depended wholly on a previous repeal of the British orders in council, was most improbable to occur. Nor is this all. The

(a) *Gray v. Sims*, (3 *Wash. C. C. R.* 276.)

contingency did not occur. The non-importation act was not repealed. So that the traffic of the vessel at Calcutta, her subsequent voyage, and her entry with a prohibited cargo, into a port of the United States, were all, at the time, prohibited and illegal acts. The policy was intended to cover an illegal trade; the trade prosecuted under it was illegal; and both facts are necessary to be considered, in order to "purify our minds from the generalities of the doctrine,"^(a) as verbally expressed.

It cannot be supposed that an insurance is void, because the parties, when the policy is effected, expect or believe that a prohibitory law interdicting a trade, meant to be covered, may or will be passed. Should the law be passed and *violated*, the contract would be annulled; but it would be extravagant to attribute the same effect to the mere intention of violating a law that never exists. It is, also, at least, doubtful whether the intention to cover a future voyage, prohibited by a law then existing, but not yet, in force, would be sufficient to avoid the contract, should the law be repealed before the contemplated voyage is begun. If, in the case that has suggested these remarks, the non-importation act had not been a subsisting law when the insurance was made, it is not to be believed, that the court would have held the policy to be void, on the sole ground, that it was the design of the parties to cover a trade, in violation of such a law, should it be passed; and as the outward voyage, at its commencement, was, probably, lawful, the non-importation act not being then in force, it is doubtful, whether

(a) The forcible expression of Lord Ellenborough, in *Falkner v. Ritchie*, (2 M. & Sel. 293.)

a similar decision would have been made, had the law been repealed before the arrival of the vessel at Calcutta—that is, before any act of positive illegality had been committed.

The conclusions in which I rest, are these : The contingent expectation of the parties, that an existing law will be repealed, interdicting a voyage or trade meant to be covered by the policy, is not sufficient to render the insurance valid, when the expectation is not realized, and the voyage is undertaken and prosecuted in defiance of the provisions of the law ; and on the other hand, the contingent design of the parties to cover a trade, in violation of a future law, that it is supposed, will be passed, will not be held to invalidate their contract, if no such law is in force, when the design is to be executed. I add, that where the voyage insured is entire, and is unlawful, at its inception, from the design of the assured to employ the vessel, in some future stage of the voyage, in a prohibited traffic, the repeal of the law before this stage is reached, although it would legalize the trade, could never operate to render valid the insurance. Upon this supposition, the contract was null and void in its origin, and a contract that *dies* in its execution, by no subsequent event, independent of the consent of the parties, can be restored to life.(a)

(a) Note XIII.



PROOFS AND ILLUSTRATIONS.

NOTE I.

P. 316, § 2. Le Guidon (ch. ii. § 2. Cleirac *Us. & Cout.* 195,) says that insurances may be made upon all goods and commodities, of which the *transportation is not prohibited by the edicts and ordinances of the king*, and that when a license is obtained from the crown, the insurance upon prohibited goods is valid; but that in such cases, the existence of the license must not only be made known to the insurer, but it must be specified in the policy, otherwise the insurance is void. Prohibited goods, exported or imported, under a licence must be specifically described in the policy, (*ib.* § 3.) Emerigon, (*ch.* viii. § 5,) says, that a policy upon prohibited goods is absolutely void, even when it appears, from a special clause, that the character of the goods was known to the insurer, and that in such cases, the payment of the premium, can no more be enforced than that of a loss. He doubtless meant the proposition to be understood with an exception of the cases in which the trade is authorized by the crown, and the license specified in the policy.

Very few of the foreign ordinances contain an express prohibition of insurances upon a prohibited trade; but the reason of the omission is obvious. It was known that such insurances would necessarily be declared invalid by the tribunals, by the application of the general rule, avoiding all contracts founded on an illegal consideration, or meant to promote an illegal purpose.

The Prussian code, however, prohibits all insurance upon

an illegal trade, under severe penalties, but by a refinement of legislation, instead of vacating the contract, it confiscates the policy, and substitutes the government in the place of the assured. Where the knowledge of the insurer is proved; where he is a "*particeps criminis*," such a provision seems not unjust or unwise. *Allgem. Land. 2 Theil. tit. Assecuranz*, § 1853.

Benecke, (1 *Benecke*, (*Rossetti*), p. 25,) states, that it is a general rule, that insurances upon any trade prohibited by the laws of export or import, of the country where the policy is effected, are wholly void: but that the rule seems to be enforced in England with a peculiar, and as he evidently thinks, an unnecessary rigor.

Dr. Pohls remarks that insurances may be illegal and void upon two grounds. First, as relating to a trade in contravention of the laws of the country where the contract is made; and secondly, as violating an express law of prohibition relative to the objects of the insurance. That, as to the first, it may be laid down as a general maxim, that a trade interdicted by the laws of the country where the contract is made, is never, in that country, a legitimate subject of insurance; that the insurance is then accessory to the trade, and as such, partakes its character, and shares its illegality; that the rule is also justified by reasons of political expediency, since to permit the insurance of a prohibited trade, is to increase the temptation and the facilities to its prosecution; and that this is especially true, where the risks arising from the trade itself, are embraced in the policy. (*See-Assecuranz Rechts. Erst. Theil.* p. 69.)

It is evident, that both these writers use the word "general," in the sense of "universal," since neither of them states that, in any country, any exception to the rule has ever been admitted.

Baldasseroni seems to confound insurances upon a contraband trade, in violation of the laws of the country where the insurance is made, with those in violation of the laws of a foreign country, to which the vessel is destined, or from which she sails; since it is to the latter, exclusively, that the only rule which he distinctly adopts is applicable—namely, that goods which, as prohibited, are liable to confiscation, cannot be a subject of insurance, unless it clearly appears that the under-

writer knew, and meant to assume, the additional risk; yet he could not have meant to deny, that in the former cases, the contract is void, as he quotes the opinion of Emerigon to that effect, without questioning its propriety. (*Baldass. Assecur. Marit. Tom. 1, Parte 3, Tit. 3, p. 256, 7.*)

Piantanida (*Della Guiris. Mar. Tom. 2, Tit. 1, p. 8,*) and Alauzet, (*Trait. Gen. des Assur. Tom. 1, p. 310,*) evidently consider the rule to be universal, that no valid insurance can be made for any object or purpose whatever, forbidden by the laws of the country where the contract is concluded, and the latter says, that on this subject there is an entire consent in the opinions of jurists: "*à cet egard les auteurs sont unanimes.*"

NOTE II.

P. 318, § 6. In *Keir v. Andrade*, (6 *Taunt.* 504,) C. J. Gibbs seems to assume, that where the goods insured are not liable to forfeiture, the insurance is in all cases valid, and in *Pieschell v. Allnutt*, (4 *Taunt.* 796,) he used similar expressions. It is, however, probable, that he meant that the position should be limited to the cases in which the goods are wholly innocent; that is, in which their transportation is, in no sense, and by no penalty, forbidden, and they are not covered by an insurance, that, as *entire*, is illegal. The decisions clearly show, that it is only in this limited sense, that the position is true—that the exemption from forfeiture of the subject insured, sustains the policy. Thus, in *Farmer v. Legg*, (7 *Term.* 184,) in which the want of the necessary certificate as to the qualifications of the master, was held to avoid the policy upon the ship, the only penalty imposed by the statute that was violated, was a pecuniary fine upon the owners. There was no pretence for saying, nor was it alleged, that the ship was liable to forfeiture.

In *Suart v. Powell*, (1 *B. & Ad.* 266,) the question was, whether the voyage insured in a policy upon the ship and freight, had been rendered illegal by the ship not having on board, at its commencement, the proportion of British seamen required by the navigation act of 6 Geo. IV. c. 109;

and it was insisted by the counsel for the assured, that, as the statute created no forfeiture, but merely imposed a penalty upon the master and owners, of £10 sterling for each foreign seaman taken on board, the supposed illegality was not of a nature to affect the insurance. The court, upon other grounds, decided the case in favor of the assured; but it seems to have been distinctly admitted by Lord Tenterden—and the admission is implied in the opinions of the other judges—that if the conduct of the master, in supplying the deficiency of his crew by foreign seamen, could, under the circumstances, have been justly considered a violation of the statute, it would have rendered the voyage illegal, and, by consequence, have avoided the policy. These effects would, therefore, have been produced, merely by the general prohibition of the statute, that no British vessel, unless duly navigated, should depart from any British port, in any part of the world. (6 *Geo. IV. c. 109*, § 18; *also*, § 4, 12, 19.)

So, in many of the cases in which the voyage or trade insured has been held to be illegal, in consequence of the violation of a license, the only effect of the breach, or abuse, of the license, was to subject the party to the forfeiture of his bond, or other penalty, but not to work a forfeiture of the subject insured.

Thus, in *Parkin v. Dick*, (11 *East*, 50,) although the ship was liable to forfeiture, there was no forfeiture of the larger portion of the goods, on which the insurance was made, and the loss claimed; but, as the voyage was illegal, from the transportation of goods not included in the license, under which it was prosecuted, and the contract was entire, the underwriters were discharged.

The case of *Gibson v. Service*, (5 *Taunt.* 433,) goes much further than any that have been cited; for the policy was held to be void, although the acts rendering the voyage illegal, neither created a forfeiture, nor subjected the owners or master of the ship insured, to any penalty whatever. The insurance was on an American ship, at and from the river Congo, on the coast of Africa, to Charleston, South Carolina. It appeared, in evidence, that at the time the insurance was effected, the ship insured, and an English vessel, in company with which she afterwards sailed, were both in the port of Liverpool; that the English vessel there took

on board a cargo of gunpowder and arms, the exportation of which, except under certain conditions, was prohibited; and that her owners, as required by certain acts of Parliament,^(a) gave security to the officers of the customs, in treble the value of the cargo, that it should be wholly expended in trade, on the coast of Africa. Before the vessels sailed, it was agreed between their respective owners, that after their arrival on the coast of Africa, part of the cargo of the English ship should be made over to the American, and this agreement was afterwards carried into execution. Gibbs, C. J., nonsuited the plaintiff, on the ground that this agreement between the owners of the respective ships was illegal. That its effect was precisely the same as if the American ship, which had given no security whatever, had taken on board, on her voyage from England, the arms and gunpowder that were to be delivered to her on the coast of Africa. It was, therefore, an illegal exportation, and this illegality vitiated the policy. On a motion to set aside the nonsuit, the counsel for the assured contended that the statute (33 Geo. III. c. 2, § 4,) which forfeited the ship in which arms and gunpowder are illegally exported, could only apply to the ship in which the goods leave England; that consequently, it was the British ship only—as the statute only forfeited one ship—that was subject to the penalty. The American ship, which had not taken the goods on board until she was out of the jurisdiction of English laws, had committed no offence whatever. None of the provisions of the act of Parliament applied to her. That the statute, moreover, applied only to the exportation from England, and here the insurance was, *at* and *from* the coast of Africa. Consequently, if any offence had been committed, it was not in the course of the voyage insured. The court, in delivering their judgment, confirming the nonsuit, did not deny the construction given to the statute by the counsel, nor allege that the ship insured, her owner, or master, were subject to any penalty whatever; but they held that the transaction was fraudulent, and that, as the illegal agreement in which it originated was made in England, it was imma-

(a) 29 Geo. II. c. 16, § 1, 2, 3, 4; 33 Geo. III. c. 2, § 4.

terial where it was executed. This agreement made the exportation of the goods unlawful, and in this illegality, the ship insured, and her owners, were involved. As the illegality, in this case, seems, at first view, to have had no relation to the voyage insured, but to have been prior and independent, the legal reader may be inclined to attribute the decision rather to the just indignation of the judges at a fraudulent evasion of the laws, than to their strict adherence to legal principles; but there are two grounds, which, although not stated in the report, doubtless, influenced the judgment of the court, upon which the decision is readily defended. 1st—The voyage from England, and that from the coast of Africa, may justly have been considered as one and entire. In the original design of the assured, they were parts of an integral adventure. 2d—The policy was *at* and from the coast of Africa, and must, therefore, have attached whilst the goods illegally exported were on board the ship.(a) (Vide *infra*, § 30, p. 342,) and *Bird v. Appleton*, (8 Term, 562.)

The cases that have been cited, considered in themselves, are quite decisive. But it must be admitted, that there are other authorities in addition to those already noticed, that if followed, would lead to an opposite conclusion.

It has been, not decided, but certainly and clearly intimated, by the Supreme Court of Massachusetts, that where a statutory provision that has not been observed in the voy-

(a) It is suggested by Mr. Phillips, that the decision in *Gibson v. Service*, is in opposition to that of Lord Mansfield and the King's Bench, in *Holman v. Johnson*, (*Cowper*, 341,) in which it was held that a foreigner, who, at Dunkirk, sold goods to an Englishman, which he knew the latter intended to smuggle into England, was not precluded from recovering the price in a British court; but upon examining the cases and the reasoning of the judges, it will not appear that there is any contradiction between them. The ground of the decision in *Holman v. Johnson*, was that the plaintiff by the sale at Dunkirk, was guilty of no crime, transgressed no law of England, and was in no sense, a party to the illegal act, the smuggling of the defendant. That of *Gibson v. Service*, that the plaintiffs, the owners of the ship by their unlawful agreement and subsequent acts, were guilty of a positive violation of English laws. They promoted and aided an illegal exportation of prohibited goods. They were in effect themselves the exporters.

age insured, is sanctioned by a penalty, other than a forfeiture, it is to be presumed that the infliction of the penalty is the only consequence that it was intended should follow the violation of the law, and hence that, in such cases, the contract of insurance retains its validity. *Ward v. Wood*, (13 *Mass.* 539,) and more fully, *Warren v. Manufac. Ins. Co.*, (13 *Pick.* 518.) In the latter of these cases, several English decisions were referred to in support of the doctrine.

That some of these decisions seem to favor the doctrine, is not to be denied. Hence it is necessary to examine what is their true import, and how far they are to be reconciled with other authorities. The first, and most important case, is that of *Atkinson v. Abbott*, (11 *East*, 135.) The policy was on goods in a British ship, on a voyage "from London to Helsingberg," (a Swedish and neutral port,) "the Sound, and Copenhagen, all or either." At the time the insurance was made, hostilities existed between England and Denmark, and a great military and naval force, which had been sent from England, and had bombarded Copenhagen, was supposed to be still, at, or near that city. The ship took out a clearance for Helsingberg alone, but the real object of the adventure, was to carry out provisions for the use of the British fleet and army at Copenhagen. There was a total loss from Danish capture. The jury found a verdict for the plaintiff, and upon an application to set it aside, the counsel for the underwriters raised two objections to the plaintiff's recovery. 1st—That the voyage was illegal, because one of its objects was a trading with the enemy, the intention being that the ship should at all events go to Copenhagen. To which the reply given by Lord Ellenborough, and concurred in by the other judges, was, that the jury were satisfied on the trial, and such was his own conviction, that the voyage was not illegal in intention, or in act; but that the adventure was undertaken for the sole and meritorious purpose of supplying the British fleet and forces. The second objection was founded on the 3d section of the navigation act, (12 and 13 Car. II. c. xi.) by which every ship, before her departure from any port in England, is required to take out a custom-house clearance for the port to which she is destined; and it was argued by the counsel, that as it would be plainly illegal for a vessel to sail without a clearance, it

necessarily followed, that a false clearance, which was a fraud upon the law, and, in truth, no clearance at all, must have the same effect; and, that the clearance in this case was certainly false, as it was taken out for a place to which there was no intention whatever of proceeding. The first answer made by Lord Ellenborough to this objection, was, that it was by no means to be taken for granted, that in no event whatever, was it intended, that the ship should go into Helsingberg. That it was certainly not the immediate intention of the captain to go there, but had he found that the British forces had left the Danish territories before his arrival, he might well have thought it expedient to proceed to the neighboring Swedish port, as he was entitled to do, within the terms of the policy; and he then remarked:—"But I am not satisfied, that it would have made the insurance illegal, if the captain had never intended to go into Helsingberg at all. There is nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy, to which there is no intention of going. The statute of Car. II. only gives a penalty of £100 for taking out a false clearance, but there is nothing in that to make the voyage illegal. That was determined in *Planché v. Fletcher*, (*Doug.* 251,) and though the particular statute is not referred to in the report of the case, yet the provision of it was probably in the contemplation of the court." My observations on this case, are, 1st—That there was no express decision of the question, whether a false clearance renders the voyage, and an insurance thereon, illegal. The court were of opinion that there was no sufficient evidence that the clearance was false, that is, that the captain did not intend to go into the port for which he cleared. Consequently the assertion, that admitting the clearance to be false, the policy was still valid, was only hypothetical—not a point decided. 2d—It does not appear from the report of *Planché v. Fletcher*, in *Douglas*, that the point was there determined, or meant to be determined; not only, is there no reference in the report to the provisions of the navigation act, but it is not alleged, or intimated, either by the counsel or the court, that the act of taking out, or sailing with a false clearance, was prohibited at all. The only allegation was, that when the fact is concealed, it is a

fraud upon the underwriters. The fair inference seems to be, not that the provision of the statute was "probably in the contemplation of the court," but that it wholly escaped the attention and recollection, both of court and counsel. It is a novel and a very dangerous doctrine, that the silence of a court upon a question not raised or discussed, is to be regarded as an *authoritative* decision. Lastly—The position of Lord Ellenborough, that, as the statute only gave a penalty of £100, there was nothing in that to make the voyage illegal, must necessarily be understood in one of two senses; either that the imposition of a penalty is not a prohibition of the act to which it applies, so as to render that act unlawful; or, that when the act, although prohibited, and, therefore, illegal, is prohibited under any other penalty than a forfeiture of the subject to which a contract may relate, the contract is valid; and, in whichever sense the doctrine is understood, it is not to be reconciled with prior and subsequent decisions of direct and higher authority. As to the first question, does a penalty imply a prohibition? In *Bartlett v. Viner*, (*Carth.* 252,) the rule was laid down by Lord Holt, which has never since been directly impeached, and in many cases has been distinctly admitted, and followed, that "every contract made for, or about any matter or thing which is prohibited or made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty upon the offender, *because a penalty implies a prohibition, although there are no prohibitory words in the statute.*" Now with this rule, it seems impossible to reconcile the opinion of Lord Ellenborough. If the statute of Car. II. imposing a penalty on taking out a false clearance prohibited the act, then a vessel sailing with such a clearance, violates the law, and her voyage is illegal; for the mere taking out of the clearance is plainly not the act meant to be restrained and punished; but the use of that clearance on the voyage to which it relates. A policy, therefore, on such a voyage, is a contract relating to a matter or thing which the statute prohibits. In the case of *Bensley v. Bignold*, (5 B. & Ald. 335,) the action was brought by printers, for their labor and materials in printing a pamphlet to which they had omitted to affix their names. The statute, 39 Geo. III. c. 79, § 27,

expressly enacts that this shall be done in all cases, and imposes a penalty of £20 for every copy otherwise published; but does not expressly prohibit, or declare unlawful, a printing and publication without the names. The Court of King's Bench held, that the violation of the statute was a fatal objection to the recovery of the plaintiffs. *Báyley, J.*, said, "Where a provision is enacted for public purposes, it makes no difference whether the thing be prohibited absolutely, or under a penalty;" and *Holroyd, J.*, "There does not appear to me, to be any sound distinction between the cases, where a statute require a thing to be done, and where it prohibits it from being done. Here the act requires the printer's name to appear on the book, which is in effect the same, as if it *prohibited* him from printing any work without affixing his name to it." Applying this remark to the statutory provision in the case of *Atkinson v. Abbott*, the requiring a vessel to sail with a true clearance, is the same as a prohibition to sail with a false.

The case of *De Begnis v. Armistead*, (10 *Bing.* 107,) proceeds upon the same principles, and the rule as originally laid down by Lord Holt, is literally recited and adopted by C. J. Tindal. And the same rule is also distinctly recognized in the following cases; *Drury v. Defontaine*, (1 *Taunt.* 136.) *Gallini v. Laborie*, (5 *Term R.* 242.) *Ribbans v. Crickett*, (1 *Bos. & Pull.* 264.) *Blachford v. Preston*, (8 *Term R.* 89,) and *Law v. Hodson*, (11 *East*, 300.) It is needless to cite further authorities. It is sufficient to say that Mr. Justice Story, in *Clark v. Protection Ins. Co.*, (*Sup.* § 7, p. 318,) considers the rule, that a penalty implies in all cases a prohibition of the acts to which it applies, as established beyond the reach of controversy. As to the second position that a forfeiture of the subject to which a contract relates, is necessary to invalidate the contract, it is sufficiently refuted by the cases cited in the beginning of this note, to which, in reference to other contracts, cases, almost innumerable, might be added. Of these *Bensley v. Bignold*, and *De Begnis v. Armistead*, are both examples. The conclusion is, that the dictum of Lord Ellenborough, (for in truth it is nothing more,) in *Atkinson v. Abbott*, in whatever sense it is interpreted, cannot be sustained as law. The other cases of policies to which the Supreme Court of

Massachusetts refer, are *Dawson v. Atty*, (7 *East*, 367.) *Bell v. Carstairs*, (14 *East*, 394,) and *Carruthers v. Gray*, (15 *East*, 35,) but these cases do not appear to have any application to the question under discussion, namely: whether the prohibition under a penalty, without a forfeiture, of a particular mode of prosecuting a voyage or trade, is sufficient to render the voyage illegal, and when insured, to avoid the policy. In *Dawson v. Atty*, and in *Bell v. Carstairs*, the insurance was on an American ship, and the objection to the recovery in each, was the want of certain documents on board the ship, required by the treaty between the United States and France. There was no allegation in either, that any *British* statute had been violated, and that the voyage was illegal for that cause. In *Carruthers v. Gray*, the only question decided, was that stated in the text, (p. 320,) that the misconduct of a master in violating a statutory provision could not affect an insurance upon the innocent goods of an innocent shipper. The Supreme Court of Massachusetts also refer to the case of *Law v. Hollingsworth*, (7 *Term*, 156,) but the Court of King's Bench, in that case, expressly declined to decide the question as to the construction and effect of an act of Parliament, that was alleged to be violated. Lord Kenyon only intimated a very reasonable opinion, that an unintentional violation of a statutory provision may be excused by special circumstances. The only other cases to which the court referred, are *Johnson v. Hudson*, (11 *East*, 180,) and *Gremare v. Valon*, (2 *Camp*, 144.)

In the first of these cases, it was decided, that a breach of a revenue regulation, which is protected by a specific penalty, in cases not involving a fraud upon the revenue, is not sufficient to avoid a contract which the statute does not expressly declare to be void. But it clearly appears, from the language of Lord Tenterden, in the subsequent case of *Brown v. Duncan*, (10 *B. & Cress.* 93,) that cases under the revenue acts, rest upon peculiar grounds, and constitute an exception to the general rule. His lordship, in delivering the judgment of the King's Bench, in that case, after observing that there had been no fraud on the revenue on the part of the plaintiffs, but a mere non-compliance with certain regulations of an act of Parliament, proceeded in substance to

remark, that the object of the revenue acts is not the protection of the public, but solely that of the revenue ; and hence, that there are no reasons of public policy that should lead the courts to avoid the contract, when no fraud on the revenue has been in fact committed ; and that such cases are “very different from those where the provisions of acts of Parliament have for their object the protection of the public.”

In *Gremare v. Valon*, the action was brought for the recovery of a compensation for a surgical cure of the defendant, and it was insisted that it could not be maintained, because the plaintiff was not a member of the College of Surgeons ; and by an act of Parliament, (3 *Hen. VIII.* c. 11, § 1,) all other persons were prohibited from acting as surgeons, within the city of London, under the penalty of a forfeiture of £5 for every month they should so act. The reply given on the trial was, that the statute contained no absolute prohibition of unlicensed persons acting as surgeons, and, therefore, they might well maintain an action against persons whom they had attended. By paying the penalty, they satisfied the law. Lord Ellenborough, apparently satisfied by this reasoning, directed a verdict for the plaintiff ; but the Court of King’s Bench, when the case came before them, avoided wholly the question whether an unlicensed surgeon could maintain the action, and held that it had not been proved that the plaintiff had not been regularly licensed ; and upon this ground, solely, refused to set aside the verdict. It is a fair inference, that had this proof been given, it would have been held that the action could not be maintained. Upon a different supposition, the proof was unnecessary.

It is further to be remarked, that it is impossible to reconcile the decision of Lord Ellenborough, at *nisi prius*, in this case, with his own decision in the subsequent case of *Law v. Hodgson*, (2 *Camp.* 147.) The action was brought to recover the price of a large quantity of bricks, sold by the plaintiffs to the defendant ; and the defence was, that the bricks were not of the width required by an act of Parliament, (19 *Geo. III.* c. 42, § 1, 2,) which, after directing that no bricks of less dimensions than those specified, shall be burnt in England, imposes a forfeiture of 20s. for every 1000 bricks on every person making bricks less in length, thickness, or width, than the statute prescribes. The reply

attempted to be made to this defence, was, that the statute merely prohibited the making of brick less than the statutory size, *under a penalty*; but did not declare all contracts concerning them to be void; and, consequently, the plaintiff, although liable to the penalty, was well entitled to recover the value of the bricks he had sold; but Lord Ellenborough held the objection to be fatal. The prohibition of the statute, he remarked, was absolute, and the plaintiff, therefore, in making the bricks in question, had been guilty of an absolute breach of the law, and could not be permitted to maintain an action for their value. In *Gremare v. Valon*, the prohibition of the statute was just as direct and positive, the plaintiffs breach of the law, upon the supposition that he was not a licensed surgeon, just as certain and absolute. The decisions are repugnant, but the cases not distinguishable.

In conclusion, the case of *Atkinson v. Abbott*, if it is to be regarded as a positive decision, appears to stand alone. I am unable to discover any special reasons for exempting it from the general rule, that a voyage that is required by statute to be commenced and prosecuted in a certain manner, by the violation of the statute, becomes throughout illegal; and that this illegality avoids the insurance. If the voyage is illegal, when the ship sails with a master not duly qualified, (*Farmer v. Legg*), or with a crew not containing the due proportion of British seamen, (*Suart v. Powell*), I cannot suggest a reason why the same consequence should not follow when the vessel sails contrary to the provisions of a statute, with a false clearance. The statutory provisions, in all the cases, are of the same nature. In all, they bear a direct relation to the subsequent voyage. I feel warranted, therefore, to re-affirm the positions in the text, that the illegality of the voyage, in all cases, avoids the policy, and that the voyage is always illegal when the goods or trade are prohibited, or, in the mode of its prosecution, the provisions of a statute having for their object the public good, have been violated.

NOTE III.

P. 321, § 9. The *Jonge-Clara*, (1 *Ed. Ad. Dec.* 371.) The vessel belonged to Embden, and was captured on a voyage from Bordeaux to London, and the questions were, whether the vessel and cargo were sufficiently protected by a license from the crown, it being insisted by the captors, that the conditions, on which the license was granted, had been violated. One objection was, that the license was vitiated, because goods, not included in it, and belonging to other merchants than those who claimed its benefit, were found on board. In answer to this objection, Sir William Scott remarked—"There are other goods on board, which are not within the enumeration of the license, and they must of course be condemned; but the penal consequence will not go to affect the license. It would fall extremely hard upon the commercial interests of this country, if the innocent goods of one merchant should be confiscated on account of the misconduct of another. Such a position would carry the doctrine of infection beyond what is done, even in cases of contraband, where the penalty attaches only to the property belonging to the same owner."

Pieschell v. Allnut, (4 *Taunt.* 791.) The insurance was on goods imported from an enemy's country, but enumerated in a license, by which the voyage was legalized. A quantity of books not covered by the license, were on board the vessel, and it was contended, that the whole voyage and trading were thereby rendered illegal, and consequently, the policies void. The Court of King's Bench overruled the objection, and Gibbs, J., observed, "Giving the defendant, the full benefit of all his argument, there is not the least doubt in this case. In the Court of Admiralty, if the ship's goods and books had been libelled, the books would have been condemned, and the ship and other goods would have been restored, and if they ought to be restored, I can find no ground why they should not be insured." The position that the ship as well as the goods, protected by the license, would have been restored, it will be seen hereafter, is more than doubtful. Although the preceding cases related wholly to a trading with the enemy protected by a license, it is

evident, that the principle upon which they proceed equally applies to a trade, in violation of municipal laws; and this principle, it is obvious, only applies where the goods, innocent in themselves, are not liable to confiscation on account of the misconduct of their owner. Where the penalty of confiscation attaches, the insurance is, doubtless, void.

NOTE IV.

P. 322, § 12. *Parkin v. Dick*, (11 East, 502. 2 Camp. 221.) The policy was on goods to be thereafter specified, to the amount of £10,000; a small portion of the goods thereafter specified, were naval stores, the exportation of which had been prohibited by a proclamation of the king, issued under authority of an act of Parliament. Lord Ellenborough nonsuited the plaintiff, and upon a motion to set aside the nonsuit, his lordship observed, "The statute, having made the exportation of, and trade in, naval stores, contrary to the king's proclamation, illegal, impliedly avoids all contracts made for protecting the stores so exported. It is an illegal act to sail with such stores on board, and subjects the ship itself to forfeiture. The policy is one entire contract on goods to be thereafter specified, to which the underwriters subscribed; and the subsequent specification by the assured, cannot alter the nature of the contract, with respect to the underwriters, so as to sever that which was originally one entire contract. It has been decided, a hundred times, that if a party insure goods altogether in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void."

Camelo v. Britten, (4 B. & A. 184.) The insurance was on wine, shot, lead, gunpowder, and goods in bales, valued at £2500. Part of the cargo consisted of 100 barrels of gunpowder, the exportation of which, except under a license, was, at the time, prohibited. A license had, however, been procured, but it required a bond to be given to the officers of the customs by the merchant exporter, for the due landing of the gunpowder at the port to which the exportation was permitted, and the bond was given by the manufac-

turer, and not by the plaintiff, who was the owner of the goods shipped. The counsel for the underwriters, upon the authority of *Parkin v. Dick*, insisted that the exportation of the gunpowder, being thus rendered illegal, the policy, as an *entire* contract, was wholly void. C. J. Abbott, in delivering judgment, said, that the court, with great reluctance, had arrived at the conclusion that the plaintiff must be considered as the merchant exporter, who ought to have given the security required, by the license, and, consequently, the terms of the license, not having been complied with, that the plaintiff could not recover. Judgment of nonsuit was accordingly given. As the plaintiff, in this case, was not permitted to recover, even for the loss of the goods not included in the license, the court necessarily adopted the argument of the defendant's counsel, that the contract was entire.

Keir v. Andrade, (6 *Taunt.* 498.) The policy was upon "goods" from London to Madeira, valued at £5000. Among other goods, laden by the plaintiffs, were 300 barrels of gunpowder. Upon the trial a license was produced and proved, covering the exportation of 150 barrels, and an attempt was made to protect the residue by another license granted to other persons; but no evidence was given to connect the plaintiff with this license, and the exportation, therefore, of 150 barrels was admitted to be illegal. The question as to the effect of this illegality, was reserved by the judge on the trial, and a verdict was rendered for the plaintiff, for the value of the whole cargo. Upon the argument of a rule to set aside the verdict, and enter a nonsuit, the objection was distinctly taken by the counsel for the underwriters, that the policy was an entire contract, attaching, at the same instant, on the property, legally, and that, illegally, exported, and, being void, in part, was altogether invalid, the assured, having no right to sever it, and protect the legal parts, rejecting the other. But the court disregarded the objection, and held that the 150 barrels, covered by the license, and the other goods, not being subject to forfeiture, the insurance was valid upon them, and was only void as to the 150 barrels illegally exported; they, therefore, directed the value of them to be struck off from the verdict, and confirmed it as to the residue. In delivering the opinion of the court, Gibbs, C. J., said, "The plaintiff claims the value of

150 barrels of powder, and a loss by capture is proved. The underwriter says, the subject-matter of the insurance was powder, which cannot be exported without license; that 150 barrels, only, were licensed, and 300 exported; therefore the whole adventure was illegal, and the insurance illegal for the whole. The court has no difficulty in dealing with the excess, and declaring that the exportation of it was illegal. But if the 150 licensed barrels were not forfeited, then the exportation of them was legal, and the insurance thereon is also legal. The first 150 barrels could not be seized; they are not forfeited, and the insurance on them is valid."

The reader will observe that, in this case, the sole ground of the decision was, that the licensed barrels were not liable to forfeiture; an assertion just as true, in respect to the lawful goods in *Parkin v. Dick*, and *Camelo v. Britten*, and I, therefore, own my inability to frame a distinction by which the decisions can be reconciled. The contract, in this case, was, certainly, entire in the same sense as in the former. The insurance was on goods generally, and included in one valuation; nor was it denied that the prohibited goods, the unlicensed barrels, were a part of those covered by the policy. Indeed, the fact was admitted in the direction given by the court, that their value should be deducted from the verdict. If they were not included in the valuation at all, the plaintiff was plainly entitled to recover the whole amount, since, upon that supposition, there had been a total loss of all that the policy was meant to cover. It is remarkable that the court make no allusion to the objection founded on the entirety of the contract. They treat the case as if the only difficulty consisted in separating the 300 barrels, so as to determine to which portion the license should be applied; and this difficulty they solved by applying the license to the first 150 barrels put on board; but the difficulty in the severance of the contract is wholly overlooked. It is also remarkable, that the case of *Parkin v. Dick* was not cited, or referred to, by the counsel or the court, and to this omission the decision must, probably, be ascribed.

In *Clark v. The Protection Ins. Co.* (1 *Story*, 109,) Mr. J. Story says, that *Keir v. Andrade* was "a very strong case," and, from this and other expressions, was certainly

aware that it was hardly to be defended upon principle, or to be reconciled with other decisions.

There are, however, two cases that may be thought to correspond with the decision in *Keir v. Andrade, Butler v. Alnutt*, (1 *Starkie*, 176,) and *Shiffner v. Gordon*, (12 *East*, 296.)

In the first of these it was decided by Lord Ellenborough, that a license for the importation of specific articles, is not vitiated by the introduction of other articles not specified, but forming a part of the goods insured, and the assured was, therefore, permitted to recover; but, it does not appear that the insurance, in this case, was entire. The articles, not included in the license, may have been, and, probably, were, specifically insured. The decision, therefore, only proves that a party, trading under a license, does not lose its benefit by importing articles that it does not embrace. The only consequence is that those articles are not protected by the license.

In *Shiffner v. Gordon*, the plaintiff, who was an insurer, was permitted to recover a part of the premiums of insurance upon several policies that covered entire mixed cargoes of British and enemies' property from an enemy's country, the importation of the former being covered by licenses, that of the latter being admitted to be illegal. The recovery was limited to so much of the premiums as covered the British risks; but it was founded, not upon the decision of the court, but, solely, upon the consent of the defendant's counsel, and Lord Ellenborough remarked, "It is a very dangerous question for the plaintiff to stir in this case, if we are pushed to decide upon it, whether these were not entire mixed cargoes of British and enemy's property in each ship, respectively covered by the several policies, on which the premium was not divisible; but as the defendant's counsel has consented to waive the question, it is unnecessary to say more upon it." It is plain from these observations, that had the court been compelled to decide the question, and had considered the cargoes as entire, and the premium not divisible, the decision would have been against the plaintiff. The partial illegality of his entire contract would have been an entire bar to his recovery. It were, indeed, to be wished for the reasons stated in the text, that the decision in *Keir*

v. *Andrade*, could be sustained ; but the opposite decisions are not only of greater weight and authority, but, it must be confessed, are in perfect harmony with the general rules of law. It is a general rule, that the partial illegality of an entire contract, renders it wholly void, and I fear, no special reasons can be assigned for exempting the contract of insurance from its operation. The rule may be, and probably is, inexpedient and unjust in most, if not in all, of the cases to which it applies ; but to repeal it, is the sole province of the Legislature—all that judges can do, is to be equitably astute in limiting its application.

It will not escape the legal reader, that all the cases cited in this note necessarily imply, that where the lawful goods of the owner of unlawful, are separately insured, the insurance is valid. It would be useless to consider, whether the contract is entire, if the illegal act of the assured in the shipment of prohibited goods, whether covered by the policy or not, would be sufficient to avoid it. In *Butler v. Allnut* the validity of such an insurance, is more than implied. The reasoning of the court seems equivalent to an express decision.

The doctrine, that a partial illegality avoids the entire contract, seems to be unknown to the law of France, or, at least, is not considered as applicable to the contract of insurance. The ordinance of Louis XIV., Art. 19, prohibits the merchant from insuring more than 9-10ths of the real value of his goods, that is, it compels him to be his own insurer as to 1-10th ; and upon this provision, Pothier remarks—“Should I insure my goods to their full value, not deducting the tenth, of which I ought myself to bear the risk, the contract is not, for that reason, void ; but in the settlement of a loss, the sum insured, is to be proportionally reduced ; the tenth, of which the law compels me to assume the risk, must be subtracted ;” and he then adds, (showing that the rule is general,) “In like manner, where a party insures together, a subject that may be lawfully insured, and one that the law forbids to be insured, as where the lender on bottomry insures together with the principal sum so lent, the maritime interest stipulated to be paid, the contract of insurance is not wholly void. It is only so, as to the pro-

hibited subject, and the value of this being deducted, the insurance is valid for the residue." (*Pothier*, n. 44.)

NOTE V.

P. 326, § 15. *Hagedorn v. Bazett*, (2 M. & S. 100.) The insurance was upon goods, to be thereafter valued, on board the ship *Frau Eliabe*, at and from London to any port or ports in the Baltic. The goods were shipped by the plaintiff, on account of himself and several other persons, all of whom, with the exception of two, who were Russian subjects, and domiciled in Russia, were residents at Hamburg. All the parties insured were separately interested. In order to protect the shipment, the plaintiff had obtained a license, which by its terms, covered his own goods and those of the British and neutral merchants. The counsel for the assured contended that the policy was entire, being effected by the plaintiff for himself, and as the agent of all concerned, and that, as the insurance on the Hamburg and Russian part of the cargo was illegal, the whole was illegal. Lord Ellenborough, in delivering the judgment of the court, said—"The question is, whether this license extends to protect the whole property, or only a part. Unquestionably it cannot protect that part which is Russian, that country being then hostile. It was contended also, that it could not protect that part which was Hamburg property, as that country was to be regarded as not being in a state of neutrality, within the meaning of the license, even if she were not to be regarded as an enemy. The first question, then, is, whether the contract of assurance, was so entire as to be void *in toto*, on account of either of these objections; and secondly, whether, if not void *in toto*, it will cover the interest of the Hamburgers, as falling within the description of neutral. As to the first question, we think that the mere accidental circumstance of several persons having employed one common agent, does not communicate to the others the vice belonging to the property of one of the assured; but that the contract may be distributed. In this case there was no common or joint interest in the whole of the property insured, subsisting in the different individuals,

nor is there any fraud. Had there been a partnership amongst all the parties in the entire cargo, or even if any consent had been given to the employment of one common agent, the objection might have had a different effect; but, as it now stands on the facts of this insurance, it must enure in point of legal effect, as if it had been effected by separate agents, and on distinct policies. As to the second objection, we think that the Hamburg interest was well covered by this policy. The word *neutral* comprehends all subjects of all other states, with which commerce is allowed to be carried on by existing orders of councils, and against which states there has not been any declaration of war or act of hostility, which certainly was the case of Hamburg at the time of this insurance. We are of opinion, therefore, under these circumstances, that judgment must be given for the plaintiff, as to the British and Hamburg property, and for the defendant as to that part which was Russian."

Although the insurance in this case was on goods "*thereafter to be valued*," it is not distinctly stated, whether the valuation was several or joint, or, indeed, that any value was afterwards declared. If we are warranted to infer, that the goods were valued in gross, the decision is then an express authority, that even such a contract may be severed, when the interests of the parties are distinct. There are some facts, not hitherto mentioned, that seem to justify this inference. Although the parties were separately interested, it is stated, that they were so interested in certain definite proportions. Thus, the plaintiff is stated to have been interested in the proportion of 1-4th, and the Russian merchants in the proportion of 1-16th. Now, this cannot mean that they had undivided interests in these proportions, in the goods insured, for then all the assured would have had a common interest in the cargo, which Lord Ellenborough expressly says, was not the case. The necessary consequence seems to be, that they were interested in the proportions named in the policy, that is, that the value of the goods which they separately owned, was 1-4th and 1-16th of the whole value declared. Their interests, as covered by the policy, were common and undivided, but separate in the goods themselves. Hence, there must have been a single gross valuation. Had the goods of the plaintiff, or of the

Russians, been separately valued, that value would doubtless have been stated, or if there was no valuation, joint or several, the prime cost would have been given. In neither case, would it have been necessary or proper to speak of the proportions in which the parties were interested.

NOTE VI.

P. 332, § 23. *Gill v. Dunlop*, (7 Taunt. 193.) The policy covered a voyage from Lima, or any other port or ports on the coast of South America. By the statute of 45 Geo. III. c. 34, the voyage from Lima, or any other port on the western coast of South America, was legalized, and it was from Lima that the ship in fact sailed; but as the general terms of the policy comprehended ports on the eastern coast of South America, a voyage, to or from which, was not legalized by the statute, and would have violated the exclusive privileges of the South Sea Company—it was made a question, whether the contract was not illegal on its face. The court met the objection by saying, that although the policy might comprehend voyages which could not be performed without the license of the South Sea Company, yet there was nothing to show, that if the assured had wished to pursue such a voyage, they would not have obtained the necessary license, and they referred to their former decision in *Sewell v. The Royal Ex. Assur. Co.*, as a direct authority.

The decision of Lord Ellenborough at *nisi prius*, in the case of *Muller v. Thompson*, (2 Camp. 610,) was made on the same principle that, although the general terms of a policy may comprehend an illegal voyage, it will never be intended that any other than a legal voyage was meant to be pursued.

The policy was on a ship, at and from Gottenburg to Königsberg, and if not admitted there, with liberty to proceed to any other port or ports in the Baltic or in the Gulf of Finland, and it was objected by the counsel for the underwriters, that as there were at the time the insurance was effected, many hostile ports in the Baltic, and in the Gulf of

Finland, a policy giving leave to proceed to any of them, was illegal on its face; but Lord Ellenborough replied to him, "You must show that the parties had it in contemplation, that the ship should proceed to an enemy's port in the Baltic, or Gulf of Finland. There being neutral ports within these limits, I will presume that the leave was meant to apply to such only, till the contrary is proved."

Vide also *Haines v. Busk*, (5 Taunt. 521,) in which the decision which turned on the construction of a charter party was placed substantially on the same ground, that when a voyage that, looking merely at the terms in which it is described, is illegal, may be rendered lawful by an election, or by the subsequent acts of the parties, the contract is not void on its face, but the court will presume that a lawful performance was alone intended. To these decisions, however, that of the King's Bench, in *Holland v. Hall*, (1 B. & Ald. 53,) seems directly opposed. The means of reconciliation, if they exist, have escaped my discovery. The action was on an agreement in writing for the sale of one-third of a ship, which contained a stipulation that the ship should afterward be employed on a joint adventure in the exportation of military stores to South America; the exportation of such stores was at the date of the contract, prohibited by an order in council, but might be legalized by a license from the crown. The counsel for the plaintiffs cited and relied on the cases of *Sewell v. Royal Ex. Assur. Co.*, and *Haines v. Busk*, as showing that parties may enter into a contract illegal at the time, if it may be rendered lawful before its entire completion; but the opposite counsel were stopped by the judges, who concurred in the opinion that the agreement was entire, and void on its face; and Lord Ellenborough said, that "the parties appeared to have contemplated one entire adventure, which was originally illegal, and that he could not discover that the illegal purpose had ever been abandoned, or that any thing had ever been done to legalize it," and Abbott, J., remarked, that "where there is an illegal intention on the face of an agreement, the burden was upon the party who uses expressions *prima facie*, implying an illegal purpose to show that the intention was lawful;" a rule in plain conflict with that which was followed in the cases cited by the plaintiff's counsel, and equally so, with the established maxims of interpretation

that an illegal intent is never to be imputed, if, by any construction, it may be excluded, and that it is the duty of a court "*ut res magis valeat quam pereat*," to uphold, if possible, the legality of the contract.

NOTE VII.

P. 329, § 18. In *Chalmers v. Bell*, (3 Bos. & Pull. 604,) the insurance was on goods on board a Swedish ship, at and from the ship's loading port or ports in the East Indies, Persia, China, or elsewhere beyond the Cape of Good Hope, to Gottenburgh. The ship sailed to India, not with any specific instructions to the master, but upon a general speculation for the purpose of traffic. In the prosecution of the adventure, the ship proceeded first to Tranquebar and Manilla, and there took in the greatest part of her cargo. She sailed thence to Madras, and there took on board the residue of her cargo. On her voyage to Europe from Madras, she was captured by a French privateer, and subsequently condemned. As the trading at Madras was in contravention of the navigation laws, it was held that it rendered the subsequent voyage illegal, and the underwriters were discharged from the loss. I observe upon this case, 1st—That there was no evidence, nor was it pretended that the illegal trading at Madras was any part of the original design or plan of the voyage, nor even that it was contemplated by the master, when he left Manilla for Madras. 2d—That the policy was, therefore, certainly valid at its inception; it attached upon the goods laden at Tranquebar and Manilla, as soon as they were put on board, and probably covered them during the voyage to Madras. Hence, the illegality in the trading there was wholly subsequent; and lastly, that the loss, for which the insurers were held to be responsible, was, in no respect, a consequence of the illegal trading; but arose entirely from a distinct peril. The principle, therefore, of the decision, was that the insurance became void from the time the illegal goods were put on board.

In *Norville v. St. Barbe*, (2 New R. 434,) the voyage insured, which was complex and circuitous, and embraced

a great number of ports and places, was prosecuted under a license from the East India Company, which was necessary to render it legal, and the principal question was, whether an essential condition of the license had been violated by an abandonment of a voyage to Canton, the ultimate port of destination mentioned in the license, and in the policy. The ship was lost, and never afterwards heard of, on a voyage from Botany Bay to the North West Coast of America, which was within the terms of the policy; but it was insisted, that as the captain when he left Botany Bay did not intend to proceed from the North West Coast of America to Canton, the voyage, by losing the protection of the license, became illegal. It was not pretended that it was the original intention of the assured, that the ship should not ultimately proceed to Canton; on the contrary, C. J. Mansfield, in delivering the opinion of the court, expressly said, that the voyage was plainly in their contemplation when the license was obtained and the policy effected. Its abandonment, if it was abandoned, existed solely in the intentions of the captain, formed long after the policy had attached. The court decided, that the assured were entitled to recover, upon the ground that neither the terms of the license nor of the policy imposed it as a necessary duty upon the captain to proceed to Canton, and consequently, that the license had not been violated; but it was admitted by the counsel, and necessarily implied in the reasoning of the court, that a breach of the license, had it occurred, would have rendered the policy from that time wholly void. It was only upon this supposition, that the construction of the license was material, or proper to be considered at all.

NOTE VIII.

P. 350, § 38. In the case of *Lever v. Fletcher*, (1 *Marsh.* 61. 1 *Park*, 507,) the policy, which was held to be valid, was on a trade expressly prohibited by a subsisting treaty between England and Spain; but it does not appear from the report, although the existence of the treaty was adverted to, that any special objection was founded on its terms. The sole ground

upon which Lord Mansfield placed his decision, was, that an insurance upon a trade, *contrary to the revenue laws of a foreign country*, is binding upon the insurer, where he enters into the contract with a full knowledge of the nature of the trade. This case, therefore, cannot be justly considered as a decision that an insurance upon a trade, *contrary to the stipulations of a treaty*, is valid, where the contract is made within the jurisdiction of a government that is a party to the compact. Such, however, is the construction that Benecke, following Mr. Marshall, has given to it. He considers it as evidence of the established law in England, and presumes that other nations will adopt the same rule, especially as against England, and in retaliation of her policy. "*Le leggi francesi, ed alcune altre,*" he remarks; "*nulla dicono per verità di preciso circa alle assicurazioni di tale commercio contrario ai trattati; non dubito però, che tali contratti sarebbero approvati, e particolarmente poi contro l'Inghilterra, come per una specie di rappressaglia.*" (1 Benecke, 35, 36.) I am forced to regard, both his construction of the decision, and the presumption he founds upon it, as erroneous.

In the case of the *Eenrom*, (2 Rob. Ad. Rep. 1,) the outward cargo of a Danish ship, upon a voyage to Batavia, an enemy's port, consisted of articles which, by treaty between Great Britain and Denmark, each party was forbidden to carry to the enemy of the other; and upon this point, Sir William Scott remarks: "The voyage sets out, therefore, with a violation of public treaties, and of the private law of Denmark; because every treaty is a part of the public law of the country that has entered into that treaty, and is as binding upon the subjects as any part of its municipal law." If the provisions of a treaty are as binding as those of a municipal law, it is a necessary consequence, that every insurance in fraud or violation of the treaty, is illegal and void, and that it is the duty of the courts of every country bound by the treaty so to declare them. In a subsequent case, (*The Neutralitet*, 3 Rob. Ad. R. 295,) the same eminent judge, not only recognized the same principle, but made it the sole ground of the condemnation of the ship. In this, as in the former case, the ship was Danish, and was engaged in supplying the enemy with articles, not merely contraband

of war, but specially prohibited by the treaty already mentioned. As a general rule, the carriage of contraband articles, where the owner of the ship is not also owner of the cargo, does not work a forfeiture of the ship; but to this rule, the particular circumstances of the case, in the judgment of Sir William Scott, rendered it an exception. It was a case, he observed, of singular misconduct on the part of the ship-owners. They were the subjects of Denmark, and as such, under the peculiar obligations of a treaty, not to carry the articles in question for the use of the enemies of Great Britain. That the general rule rests upon the supposition, that the noxious articles are taken on board without the personal knowledge of the owners; but, that in the case before him, their privity was fully established, and that their active guilt was aggravated by the circumstance, that the trade was a criminal traffic, in breach of explicit and special obligations. He concluded, with observing, that the confiscation of the ship, in such a case, would leave the general rule untouched; and therefore pronounced it. It is the plain result from this decision, that the insurance, in every case where the terms of the treaty are violated by the assured, is void upon the ship, as well as upon the freight and the specially prohibited goods. In *Bird v. Appleton*, (8 Term, 562. *Sup. Lect.* § 29,) one of the grounds upon which the policy upon the ship was held to be illegal was, that the voyage from *Bombay*, with goods there laden, to *Canton*, was contrary to the terms of the treaty between Great Britain and the United States.

NOTE IX.

P. 352, § 39. *Delmada v. Motteux*, (1 Park. 8 ed., 504.) The insurance was on a merchant-ship at and from London to Grenada, with liberty to touch and load at Cork and Madeira. The ship proceeded to Cork, and there took on board a cargo of provisions, with which she sailed on the voyage insured. Before her arrival at Cork, an embargo had been laid by the crown upon all vessels laden or to be laden with provisions in the ports of Ireland, and this embargo was in force

when she left there. The ship was afterwards captured by a British man of war, and carried as prize into St. Lucia. The cargo was condemned as enemy's property, but the ship was restored by the Court of Admiralty, with a denial, however, to the owner, of freight and expenses; and for the recovery of these, the suit was brought upon the policy.

Lord Mansfield, upon the trial at *nisi prius*, was clearly of opinion, that the plaintiff was not entitled to recover. That the embargo, being laid by the crown in time of war, was certainly valid, and hence the breach of it was a criminal act, that rendered the contract illegal. The court, therefore, could lend no aid to its execution. In other words, the breach of the embargo rendered the subsequent voyage illegal, and avoided the policy.

Walden v. The Phoenix Ins. Co of New-York, (5 Johns. R. 310.) The policy was a valued policy, on a ship at and from New-York to Havana. Some days after the policy had attached, the vessel set sail on the voyage insured, but was stopped on the same day, at the mouth of the harbor of New-York and brought back to the city, by the authority of the government of the United States, under the Act of Congress for laying an embargo, of the passage of which, the collector of the port had just received information. It appeared in evidence, that the pilot of the ship had heard of the embargo when he took charge of her; but there was no evidence that its existence was known either to the owners, (the assured,) or to the master. The plaintiffs abandoned, as for a total loss, assigning the detention and the embargo as the ground of the abandonment; and, among other objections to their recovery, the fact, that the voyage was begun with a knowledge of its being illegal and prohibited, was relied on as conclusive. The court, however, (the Supreme Court of New-York,) were of opinion, that the objection could not prevail, and in delivering their judgment, Thompson, J., said—"The policy was effected on the 18th of December, 1807, on the vessel at and from New-York to Havana. The risk had accordingly commenced before the passage of the act," (laying the embargo,) "and the defendants' right to the premium had been fixed. The rumor, on the morning the ship sailed, of an embargo having taken place, as stated by the pilot, was too vague and uncertain to be

obligatory upon the plaintiffs, so as to subject them to the consequences of an intentional violation of the embargo, which would have been a criminal act. Another conclusive answer to the objection is, that the plaintiffs are not chargeable with any information which the pilot might have on this subject. He was not such an agent as to make his acts the acts of the assured. He was only employed for the specific purpose of conducting the vessel out to sea, and had no control or direction as to the time of sailing. This belonged to the master or owners, and there is no evidence of any knowledge of the embargo being brought home to either of them." It was not denied, in this case, by the counsel for the plaintiff, and it was necessarily implied in the reasoning of the court, that, had the assured or the master been chargeable with a knowledge of the embargo, prior to the sailing of the vessel, so as to have rendered the breach of it at the commencement of the voyage a voluntary act, the underwriters would have been discharged.

Odlin v. The Ins. Co. of Pennsylvania, (2 Wash. C. C. R. 312.) The principal question in this case was, whether the embargo, laid by Congress in December, 1807, was a peril covered by the policy, both the insurers and the assured being citizens of the United States; but in the course of his elaborate opinion, Mr. J. Washington distinctly states, that a contract of insurance made, pending the existence of an embargo on a voyage that it prohibits, is clearly void, (p. 312,) unless it appears that the contract was not to be performed until the restraint should be removed; and he also admits, that, should the vessel commence her voyage in violation of an embargo, the assured would certainly lose the benefit of his policy. (P. 320.)

NOTE X.

P. 356, § 44. All the cases of any importance, relative to an interdiction of trade, as affecting the policy, have been sufficiently stated in the text, with the exception of the two following—

Johnston & others v. Sutton, (Doug. 253.) An act of

Parliament prohibited all commerce with certain British colonies, and among others, the province of New-York, under the penalty of the confiscation of the vessel and cargo; but the law excepted ships laden with provisions for the use of his majesty's troops, and when the voyage and goods were specified in a license duly obtained; and the defence of the underwriters in this case, turned upon the construction of this act. The policy was on goods on board the ship *Venus*, at and from London to New-York. The ship cleared for Halifax and New-York. She had provisions on board, which she had a license to carry to New-York; but one half of the cargo, including the goods which were the subject of the policy, was not licensed; but the exportation, it was supposed, could be justified under a proclamation of the commander-in-chief of New-York, allowing the entry into that port of unlicensed goods. It was admitted, however, that this proclamation, as issued without any authority from the act of Parliament, was illegal. The ship, on her passage to New-York, was captured by an American privateer. On the trial, the plaintiff obtained a verdict, which the Court of King's Bench set aside, as contrary to law. In delivering their judgment, Lord Mansfield said—"The whole of the plaintiff's case goes on an established practice, directly against an act of parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favored. But, however that may be, it was illegal to send the goods to New-York, and *in pari delicto, potior est conditio defendentis*."

Mr. Phillips, (1 *Phil.* 87,) refers to this case, as showing that, "although the troops of the country to which the assured belongs, have possession of an enemy's port, it is not lawful to make a voyage thither, without the sanction of his government, and insurance on ship and goods for such a voyage, is ineffectual;" but certainly, the decision neither establishes, nor in any manner countenances, these positions. The voyage was rendered illegal, solely by the special provisions of an act of Parliament; otherwise, as the port of destination, although in an enemy's country, was in the actual and known possession of British troops, it would,

unquestionably, have been lawful. *Vide Atkinson v. Abbott, ante, Note II.*

Russell v. Degrand, (15 Mass. 35.) This was an action by the insurer, for the recovery of two promissory notes, the consideration of which was the premium on a policy of insurance. The insurance, as expressed in the policy, was from Boston to the port of discharge, in Europe; but at the foot of the policy, there was a memorandum, "that no exception was to be taken on account of ports interdicted by the laws of the United States."

A statute of the United States, passed in June, 1809, was in force at the time of the execution of the policy, which prohibited all American vessels from going to any port in France or England; and on the trial, it was proved, by parol evidence, that the voyage insured was intended to be for France, and that this was fully understood by the underwriters, when the policy was effected. The vessel sailed for, and arrived at, a French port. The jury, under the direction of the presiding judge, found a verdict for the defendant.

The counsel for the plaintiffs moved for a new trial, and endeavored to sustain the motion, upon two grounds:—1st. That parol evidence ought not to have been received, to show that the voyage intended was different from that expressed in the policy; and 2d. That, admitting the voyage to have been illegal, still the defence was inadmissible. That the giving of the promissory notes was tantamount to a payment of the premium, and consequently, the defence was equivalent to a demand to have it paid back again, contrary to the established rule, that the consideration of an illegal contract, once paid, is never recoverable. But the Supreme Court of Massachusetts denied the motion, and in reply to the first position relied on, in its support, Parker, C. J., in delivering their opinion, said—"We think there is no doubt, that the contract between the underwriters and the assured, in this case, is illegal, and that the parol evidence was rightly admitted to prove it. The evidence does not contradict the policy, for it does not show that a voyage was contemplated, different from that which was insured. The insurance was to any port in Europe, and the memorandum goes to include voyages prohibited by

the law of the United States. The evidence went to show what port was actually intended by the parties, and that proves to be an interdicted port. If such evidence is not admissible, parties can always control the laws by the terms of their contract, and in order to defeat an illegal contract it would be necessary that the parties should be weak enough to expose the illegality in the instrument they adopt for their security." In reply to the second position, the Chief Justice remarked:—"That to give effect to the suggestion contended for, would be to value the forms more than the substance of the law. That, although, in many cases, the underwriters are precluded from denying that they have received the premium, yet when they sue for the premium upon a note which has reference to the policy, the insured has always been let in to prove any facts, which destroy their right to recover, such as that the risk never commenced, or that the vessel was unseaworthy; that the plaintiff was demanding the price of an unlawful contract, and could not by a fiction consider the defendant as seeking to recover that price back, as if it had once been paid. The rule of law was universal in its operation, that no person shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain, and this rule was a complete bar to the plaintiff's recovery."

I remark upon this case, that even had the parol evidence contradicted the policy, it would not, for that reason, have been inadmissible. When the object of such evidence is to show that the real contract was illegal, it is not to be excluded, by the form, which the parties have given to their agreement, in order to disguise or conceal their intentions.

It may also, be reasonably doubted, whether, in this case, any parol evidence was necessary; whether the memorandum at the foot of the policy, was not sufficient to render the contract void upon its face. It was a stipulation, that the vessel might go to a prohibited port, without prejudice to the insurance, and the contract, therefore, by its terms, was meant to cover the risks of an illegal trade. It is true, the assured were not bound to send the ship to a prohibited port; they had only an election to do so, but the contract was entire, at an undivided premium, and for an integral voyage, and of this entire contract, the election given by

the memorandum, which was clearly illegal and void, was an essential part. The conclusion seems inevitable, that this partial illegality avoided the whole agreement.

NOTE XI.

P. 358, § 47. The *Betty, Cathcart*, (1 Rob. Ad. R. 220.) The principles that ought to govern an enlightened and humane judge in the construction and application of the laws of revenue and trade, were stated, in this case, by Sir William Scott, with his usual felicity of language, and applied with that sure moral discrimination that pervades and characterizes all his decisions. "The revenue and navigation laws (he observed) are certainly to be construed and applied with great exactness. They are framed for the security of great national interests; and the effect of such laws, founded on great purposes of public policy, must not be weakened by a minute tenderness of particular hardships. At the same time it is not to be said that they are not subject to all considerations of rational equity: cases of unavoidable accident, unavoidable necessity, or the like, where the party could not act otherwise than he did, or *has acted, at least, for the best*, must be considered in this system of laws, just as in other systems. Laws that would not admit an equitable construction to be applied to the unavoidable misfortunes and necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws for human societies. The court, therefore, will not deem it a departure from the duty of legal interpretation, in such cases, to give a fair attention to considerations of this nature." In the particular case the ship had been condemned by the Vice Admiralty Court, Jamaica, for a breach of the navigation acts, and the material facts, as they appeared in evidence, were these: The ship, which was originally British, and properly documented as such, had been captured by the French, and taken into the port of Charleston, South Carolina. The District Court of the United States, there setting, upon a claim interposed by the British Consul, determined that the capture was unlawful, as made in violation of the neutrality of the

United States, and restored the ship. The captors appealed from this sentence, and it was then agreed, in order to save the vessel from destruction, by rotting in harbor, during the pendency of the appeal, that she should be sold, and the proceeds be brought into court, to abide the final event of the suit. She was purchased by a Mr. Penman, an American merchant, on account of her original owners, should they elect to take her; if not, on account of his own London correspondents. The original owners, however, ratified the purchase, and accepted the vessel. Penman, being unable to obtain, from the French Consul, the ship's register and other documents, sent her to Jamaica, with the intention that she should there take convoy to Great Britain, and to be then delivered to the British owners; but with no other evidence of her British character, than a certificate from the British Consul, stating the preceding facts, and affirming that the ship was, and continued to be, a British bottom. The Vice-Admiralty Court at Jamaica, however, condemned her, upon the ground, that as she had no register, she could not be regarded as a British ship; and consequently, by proceeding to the West Indies with a cargo, was engaged in a trade prohibited by the navigation acts. After dwelling upon the favorable circumstances of the case, as evincing the good faith of the transaction, and the reality of the necessity under which the American purchaser acted, Sir William Scott remarked, in reply to the objection, that the purchaser had so acted, without any authority from the owners, or his own correspondents, that the court, in such a case, would presume, that he conceived himself to possess, and actually did possess, the requisite authority, and would be inclined to presume every fact, not directly contradicted by the evidence; and he concluded his elaborate opinion, with these striking observations: "To all these considerations I am to add, that the foreign merchant, in this case, will be the sufferer, if the condemnation is sustained. The original owners will be secured by the proceeds of sale remaining in the American Court. Looking to the motives under which the American merchant acted, and to the authority by which his conduct was directed, and making some allowance for his ignorance of British law, I think it reasonable to be content with less circumspection, and less regularity, than

might be required from other parties, and under other circumstances. I shall, therefore, reverse the sentence." On an appeal to the High Court of Delegates, the sentence of reversal was confirmed.

NOTE XII.

P. 362, § 51. *Ocean Ins. Co. v. Polleys*, (13 Pet. 157.) The facts of the case are sufficiently stated in the text, but it seems proper to transcribe that portion of the opinion of Mr. J. Story, to which the text refers.—“The objection to the legality of the insurance, (he observed,) was founded on the 27th section of the ship registry act of 1792, ch. 25, which declares, that if any certificate of registry or record, shall be fraudulently or otherwise used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel, and furniture. The objection, then, as insisted on by the counsel for the insurance company embraced two distinct propositions. The first was, that the schooner was sailing on the voyage under circumstances which rendered her liable to forfeiture. The second was, that the policy on her was, therefore, void. Now the first might have been most fully admitted by the court, and yet the second have been denied, upon the ground, that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry, and in no respect designed to aid, assist, or advance any such illegal purpose. We all know that there are cases where a contract may be valid notwithstanding it is connected with an independent illegal transaction, which, however, it is not designed to aid or promote. The case of *Armstrong v. Toler*, (11 Wheat. 258,) presented a question of this sort, and it was decided in favor of such a contract. But cases might easily be put, where the doctrine would admit of a more simple and easy illustration. Suppose the brig had been repaired in port, and the shipwrights had known the circumstances, under which she had obtained the new cer-

tificate of registry, would they, in consequence of such knowledge alone, have lost their title to recover for their own work and labor? Suppose a vessel had been actually forfeited by some antecedent illegal act, are all contracts for her future employment void, although there is no illegal object in view, and the forfeiture may never be enforced?"

NOTE XIII.

P. 373, § 61. I have intentionally omitted to refer in the text, to the decisions under the convoy act, 43 Geo. III. c. 57. The act, like all similar laws, was temporary, and the decisions under it, turn solely on the construction of its particular terms, and do not establish or illustrate any general principle. The cases quoted by Mr. Phillips are, *Ingham v. Agnew*, (15 *East*, 517.) *Wainhouse v. Cowie*, (4 *Taunt.* 178.) *Wake v. Atty*, (4 *Taunt.* 178.) *Darby v. Newton*, (2 *Marsh. R.* 263.) *Metcalf v. Parry*, (4 *Camp.* 123,) and *Carstairs v. Alnutt*, (3 *Camp.* 497.) The decisions of C. J. Gibbs, and of Lord Ellenborough, to which Mr. Phillips refers, as showing, that to avoid the policy upon the ground, that the vessel had sailed without convoy, it is necessary, in all cases, to prove the instrumentality or direct privity of the assured, were founded on the express words of the 4th section of the statute, declaring that all insurances upon the property of a person interested in the ship or cargo, who shall have directed, or have been any way privy to, or instrumental in causing such ship or vessel to sail without convoy, &c., shall be null and void. It is proper to mention this, as it is far from being universally true, that in order to avoid an insurance upon a prohibited voyage, the privity of the assured is necessary to be shown.

The cases collected by Mr. Phillips, under the registry acts, do not properly belong to the present head. Although the insurer is not liable for a loss resulting from the want of a register, where the facts have not been communicated, and

the risk assumed; yet an insurance upon an unregistered vessel is never wholly void, where there has been no warranty, or representation of her neutral character, and in these cases it is the breach of the warranty or representation, not the illegality of the voyage, that discharges the insurer. In what cases the production of a register is necessary, as evidence of the title of the assured, and how far it is conclusive as such, are questions that will hereafter be considered.

1

ILLEGAL INSURANCES.

ENEMY'S PROPERTY.

LECTURE IV.

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THE second general division of the present subject embraces insurances in contravention of the belligerent rights of the state, within whose jurisdiction they are effected.

§ 1. Every insurance upon property liable to confiscation, as prize of war, by the government of the country to which the insurer belongs, is, of necessity, invalid, substantially, for the same reasons, that apply to the cases we have already considered. The direct tendency of the contract is to encourage a commerce, or tempt to the commission of acts, that the government, by the declaration of war, has

interdicted, and, by its prosecution, seeks to suppress. Nor, with the probable exception of a few cases, is the actual seizure or condemnation of the property insured, necessary in order to exonerate the insurer. When an illegality, that is, in itself, a substantive cause of condemnation, exists, at the inception of the risks, it renders the contract void in its origin. When it arises, in the course of the voyage, and increases, permanently, the subsequent risks, it avoids the contract from the time that it occurs; but where the illegal acts, that expose the property to condemnation, are transitory in their nature, and do not enhance the subsequent risks, it is probable, that, unless they prove the immediate occasion of a loss, they would not be held to vary the obligations of the contract. The several cases to which these observations apply will hereafter be distinctly stated, and the important question, whether the contract is not, in some cases, illegal and void, even when the property insured is not liable to confiscation, will also be considered.

§ 2. Although the insurer is never liable for a loss resulting from the confiscation by his own government of the property insured, we are not to infer that he may not assume the risk of an incidental loss, resulting from the acts of his own government, even in the just exercise of its belligerent rights. When the capture was wholly unlawful, and the property on that ground restored, the liability of the insurer will not be doubted; but it will be seen, hereafter, that there are numerous cases in which, although the original capture was perfectly lawful, yet the ship, or goods insured, being innocent, and the conduct of the owner and his agents unimpeached, the insurer is responsible for

an incidental loss, even under the general terms of the policy.

§ 3. An inquiry into the validity of an insurance, as affected by the laws of war, is evidently an inquiry into the causes by which the property insured, by the operation of those laws, may be rendered liable to condemnation. The subject is, therefore, co-extensive with the law of capture, and the doctrine of prize. Its full elucidation would require an ample volume, and would be wholly inconsistent with the limits I am bound to observe. Yet, from a conviction of its real importance, and permanent utility, I shall treat the subject more systematically and fully than preceding writers on insurance have deemed to be necessary.

§ 4. During a war, the property insured must belong either, (1,) to alien enemies; (2,) the subjects of the belligerent country, where the insurance is made, or of its allies; or, (3,) to those of a neutral power, and the causes of condemnation will be found to vary according to the national character of the property. The subject will, therefore, be distributed and considered under the following heads:

I. Of enemies' property, considered as an object of capture.

II. Of the liability to capture of the property of the subjects of the belligerent state, and of its allies.

III. And lastly, of the liability to capture of neutral property.

§ 5. 1. *Of enemies' property.*

By the law of nations, when two powers are at war, they have a right to make prize of the ships, goods, and effects of each other, and of the subjects of each other, upon the high seas. Whatever

bears the character of enemies' property, with a few exceptions, to be hereafter noticed, if found upon the ocean, is thus liable to capture.(a) Hence, by the undivided testimony of foreign jurists, the rule has obtained from the earliest period, that an insurance made in a belligerent country, upon the property of the subjects of an opposite belligerent, is void ; and this rule is now sanctioned by legislative or judicial adoption in every country of Europe, with the exception, according to Benecke, of Denmark and Holland.(b)

§ 6. The policy, and even the necessity, of prohibiting such insurances, seems apparent. The main object of a war, especially in modern times, is to cripple the power and exhaust the resources of the enemy, by the destruction of his commerce ; and this object, the allowance of insurances upon an enemy's property, by its immediate operation, counteracts, and when extensively practiced, is certain to defeat. The naval hostilities of the state, by which such insurances are permitted and enforced, are directed, not against the enemy, but against its own subjects, and it is by them alone that its successes—which the enemy, secure of an indemnity, derides—are felt and deplored. Nor are these the only mischiefs that such insurances tend to produce. The whole body of the insurers become, in their hearts, the enemies of their own government. They are under a constant and powerful temptation to save themselves from ruin, by giving intelligence to the enemy—and this tempta-

(a) Report of 1753, in answer to Prussian memorial, made by Sir G. Lee, Sir Dudley Ryder, and Lord Mansfield. (*Wheat. on Capt. Appen.* 317.)

(b) Note I.

tion to violate their allegiance, and betray their country, we may be sure, will not always be resisted.

§ 7. Emerigon, yielding to the arguments, and apparently, catching a portion of the enthusiasm, of the Abbé Mably, expresses an earnest desire, that the laws of war may be so far modified, or changed, as to admit, during a war, an entire freedom of commercial intercourse, even between the subjects of the belligerent powers; nor is it possible to deny, that the interests and happiness of the human race would be greatly promoted by the adoption of these philanthropic views; but it unfortunately happens, that the reasons, by which they are supported, apply, with nearly an equal force, to every form of hostilities that nations can adopt. And hence there is little reason to expect that the visions of Mably, and the hopes of Emerigon, will ever be realized, *until war itself shall be abolished.*(a)

§ 8. In England, the illegality of an insurance upon enemies' property does not rest solely upon the recognition, by the municipal law, of the principle of the law of nations. It is an ancient and established doctrine of the common law, that all trading with the enemy—of which the insurance of his property may well be regarded as a particular form—is highly criminal, and that all contracts made with an alien enemy, during a war, with a few necessary exceptions, not embracing insurance, are illegal and void.(b) Adopting the forcible and

(a) Emerig. c. 4, § 9. Mably Droit Public, &c., c. 12, p. 308.

(b) The exception embraces only such contracts as arise out of a palpable necessity, created by the war itself, and which, in their nature, are

well considered language of an eminent judge, "no principle of national or *municipal* law is better settled than that all contracts made with an enemy during war are utterly void, and the principle has grown hoary under the reverent respect of centuries." (a)

§ 9. Such having always been the state of the law, it is certainly a remarkable fact, that insurances upon enemies' property were, during a long period of time, extensively practised in England, and were, not only not discouraged, but countenanced, and in effect, sanctioned by the courts. Lord Mansfield, who, during a large portion of this period, presided in the King's Bench, could never be brought distinctly to affirm, that such insurances were lawful; but he earnestly defended them upon the ground of expediency, and so great were his influence and authority, that during his judicial reign, this objection of illegality was seldom raised by the insurers. The defence was branded as dishonorable, and every attempt to introduce it, was sure to be evaded and defeated. Hence, for many years, the opinion seems to have prevailed, that insurances upon enemies' property were not unlawful; and although Parliament, not adopting those views

war contracts. Chancellor Kent seems to incline to the opinion, that a ransom bill is the solitary instance, in which a private contract with an enemy is valid by the law of nations, (16 *Johns.* 451.) But the case of *Antoine v. Morshead*, (6 *Taunt.* 237,) establishes another exception. It was there held, that a bill of exchange, drawn upon England, by a British prisoner in France, for his own subsistence, and endorsed to an alien enemy, was a valid contract in favor of the latter, which on the return of peace he was allowed to enforce. The exception was, however, admitted on the sole ground of the necessity created by the war, for affording subsistence to the prisoner.

(a) Mr. Justice Story. *The Emulous*, (1 *Gall.* 591.)

of public policy, by which Lord Mansfield was governed, prohibited such insurances under heavy penalties, by temporary acts, the argument in favor of their general legality, it was plausibly contended, far from being impaired, was strengthened, by the passage of these laws, which it was insisted ought to be construed as a legislative admission of the validity of the contract, unless restrained by statute.(a) It was not until many years after the death of Lord Mansfield, that the judges in England, with apparent reluctance, arrived at the conclusion, that an insurance upon enemies' property could not be legally sustained. The first decisions seem to have proceeded on the sole ground of the personal disability of an alien enemy to maintain a suit upon the policy during the war; but, at length, the entire invalidity of the contract itself, as repugnant alike to the dictates of sound policy, and the clearest maxims of law, was fully confessed and established.(b)

§ 10. I shall now proceed to consider the cases in which property captured on the ocean is adjudged to be subject to confiscation, as belonging to the enemy, and in which by legal consequence the insurance for its protection, if made within the jurisdiction of the capturing power, is absolutely void at its inception, or becomes so from the time the property was impressed with a hostile character.

§ 11. When the question of enemies' property turns solely upon the evidence, it is attended with no other difficulties than such as necessarily belong

(a) 21 Geo. II. c. 4. 33 Geo. III. c. 27.

(b) Note II. *Brandon v. Nesbitt. Bristow v. Towers. Furtado v. Rodgers. Brandon v. Curling*, and other cases.

to the judicial investigation of facts; but in numerous cases, where the facts are admitted or proved, questions of much difficulty as to their legal import are found to arise, that can only be determined by the just application of those rules of law, by which courts of prize, in time of war, are, or, by the law of nations, ought to be governed. These rules, in many respects, differ widely from those that obtain in time of peace in the courts of civil or common law. They involve many nice and refined distinctions, and in all cases, the exercise of a sound and discriminating judgment is requisite to secure their correct application.

§ 12. When property is shipped from a neutral country to an enemy's, or from an enemy's country to a neutral, the question of its national character, can only be determined by ascertaining whether the right of property, at the time of shipment, was vested in the shipper, or in the consignee.

§ 13. The general rule is, that goods in the course of transportation from a neutral country, to a belligerent, if they are to be delivered to, and to become the property of a belligerent immediately on their arrival, are considered as his goods during the voyage, (*in itinere*,) and as such, are subject to capture and confiscation.^(a) This rule, when the goods are shipped on account and risk of the consignee, in consequence of a prior order or purchase, is in entire conformity to that of the civil and common law. The master of a ship, who receives goods, that by the bill of lading are expressed to

(a) *The Anna Catharina*, (4 *Rob. Ad. Rep.* 107.) *The Sally*, Griffiths, (3 *Rob.* 300 in notis.) *The Atlas*, (3 *Rob.* 299.) *The Venus*, (8 *Cranch*, 275.)

be, and in fact are, shipped on account of the consignee, becomes, by the very act, the agent of the consignee, so that a delivery to him, has the same effect in vesting the property, as a delivery to his principal.

§ 14. But both by the civil and the common law, the general rule as to the effect of a delivery of goods to the master, for a foreign purchaser, may be varied by an express stipulation of the parties. They may agree that the payment for the goods shall be contingent on their actual delivery at the foreign port, thus casting the whole risks of the voyage upon the shipper, and in such cases, as the contract of sale, until a delivery, is incomplete and executory, the goods, during the voyage, in judgment of law, remain the property of the shipper.

§ 15. Nor is it merely by a special agreement, that the general rule, that a delivery to the master is a delivery to the consignee, may be varied in time of peace. It may be controlled by a prevailing usage, casting the risk upon the consignor, in a particular trade; for such a usage pre-supposes the general agreement of the merchants engaged in the trade to which it refers.

§ 16. In time of war, however, the courts of prize do not permit their established doctrine, that goods that are to become the property of a belligerent purchaser, upon their arrival, are enemies' property during the voyage, to be varied or affected, either by a special agreement of the parties, or by the usage of trade; and whatever doubts these determinations may, at first, create, they are justified by reasons that, when impartially examined, will, probably, be admitted, not merely as cogent, but conclusive. To permit the goods, during a time of

war, to be considered as the property of the neutral consignor, instead of the enemy consignee, merely, upon the ground that the former had assumed the risk of transportation, would be to put an end at once to captures at sea. The risk would, in all cases, be laid on the consignor, when it suited the purpose of protection; on every contemplation of a war, this contrivance would be practised, in all consignments from neutral ports to an enemy's country; and thus, the right of capture would be defrauded, and the chief advantage of a maritime superiority, be intercepted and frustrated. Hence, (I adopt the words of Sir William Scott,) the contract, laying the risk upon the consignor, is considered to be invalid in time of war—or, to express it more accurately, it is a contract, that, if made in war, has this effect, that the captor has the right to seize, and convert the property to his own use; for he, having all the rights that belong to the enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy, and the shipper, who put it on board during a time of war, must be presumed to know the rule, and to secure himself, in his agreement with the consignee, against the contingency of any loss to himself, that may arise from capture. (a)

§ 17. It is manifest, both from the language and the reasoning of Sir William Scott, that the admiralty doctrine, that the enemy consignee, under a contract of sale, is to be considered as the owner during the voyage, even when the contract is con-

(a) Note III. *Packet de Bilbao*. Opinion of Sir W. Scott, (2 *Rob. Ad. Rep.* 134, 135.) *The Atlas*, (3 *Rob.* 299.) *The Sally*, Griffiths, (3 *Rob.* 300.) *Contra*. *Ludlow v. Bowne*, (1 *Johns. R.* p. 1.) *De Wolf v. N. Y. F. Ins. Co.* (20 *Johns.* 214.) *S. C. in Error*, (2 *Coven.* 56.)

tingent and executory, is not confined to the cases, where the contract and shipment are made during a time of actual war. If they are made during a peace, but in contemplation of war, and with the manifest intent of protecting the property from hostile capture, they are equally a fraud upon the belligerent power to which the right of capture belongs.

§ 18. So, where a contract, by which the neutral consignor assumes the risk of delivery, is made during a peace, and not at all in contemplation of a war, yet if the shipment be made after hostilities have commenced, and with a knowledge of the war, the private agreement of the parties will not be permitted to affect the rights of the capturing belligerent.^(a) He will still be justified in considering the property as belonging to an enemy from the inception of the voyage, for it was equally the duty of the consignor, in this case, as in the former, and equally in his power, to guard himself from a contingent loss arising from capture, by requiring a proper stipulation and security from the consignee. Without such a security he was not bound to make the shipment at all, since, as the contract was not made in expectation of a war, so material a change in its risks as contemplated by the parties, would absolve him from its execution. This position is not unreasonable in itself, and if the doctrine, as laid down by Sir William Scott, is to be admitted as law, it must be true, since upon no

(a) The *Anna Catharina*, opinion of Sir W. Scott, (4 Rob. 112.) Sir W. Scott does not say that the shipment made after the breaking out of hostilities must be made "with a knowledge of the war," but this is plainly implied in his reasoning, and, without this addition, the doctrine could hardly be sustained.

other supposition could the shipment be regarded as an unlawful device to protect the property from hostile capture. Unless the war dissolved the contract, it was the duty of the consignor to proceed to its execution, and his discharge of this duty could never be regarded as evidence of a design "to defraud the rights of capture;" yet I must own that I have been unable to find any authority in support of this position in the books of common law; nor does it seem to derive any support from analogy. A contract by which a vendor who consigns goods to a foreign port, assumes the whole risks of the voyage, until their arrival, bears a close resemblance to a policy of insurance; but a contract of insurance made during peace and at a peace premium, although the risks, as contemplated by the parties, are almost indefinitely increased, is certainly not dissolved by the event of a war, however unforeseen and unexpected. Still, as the decision of Sir William Scott may be considered as having established the rule in the prize courts of England, an insurance made there upon goods shipped under the circumstances that have been stated, would, doubtless, be illegal and void.

§ 19. But where the shipment of the goods, as well as the contract, laying the risk upon the neutral consignor, is made during peace, and not in foresight or expectation of a war, the legal property which was in the consignor at the inception of the voyage, remains in him until its termination. It would not be divested in favor of a belligerent, should a war break out, before the arrival of the goods, by which the foreign consignee became an enemy. Hence, an insurance upon such a ship-

ment in the belligerent country, would be valid. It is true, that in the case in which this equitable exception from the general rule was originally stated by Sir William Scott, the shipment was made by a British to a Spanish merchant, and the hostilities that broke out during the voyage were between England and Spain; but the principle of the exception applies with equal justice to a neutral shipper, and that it is thus applicable, the enlightened judge, by whose decisions I am guided, in a subsequent case, distinctly admits. (a)

§ 20. When goods are shipped by an enemy consignor, to a neutral consignee, if the property, by virtue of a prior sale, or of an unconditional contract of sale, vests absolutely in the consignee, by the delivery to the master, the goods, if otherwise innocent, and the title remains unchanged, are exempted from capture, as neutral property, during the voyage; but as a neutral cover is the common device, by which belligerent interests are sought to be protected, shipments of this character are watched with a peculiar jealousy, and the clearest evidence of neutral ownership is not unreasonably required. It is not sufficient to establish the title, that the bills of lading and invoice are in the name of the consignee, and express the shipment to be made on his account and risk; for these documents are indispensable to give even the appearance of neutral ownership. It must be shown by what means the title was acquired. If it is alleged, that the goods had been paid for, the payment must be proved. If the goods are claimed under a contract of sale, con-

(a) *Packet de Bilbao*, (2 *Rob. Ad. R.* 133, 4.) *Anna Catharina*, (4 *Rob.* 112.)

taining provisions for future payment, or under an order for their shipment, the contract, or order, must be produced, and must appear to be absolute and unconditional, so as to bind the consignee positively to the acceptance of the goods, and to take from the consignor any right or power to reclaim them, unless in the sole event of the insolvency of the consignee, previous to their arrival. If any election is given to the consignee, or any power of direction, or control, is retained by the consignor, the goods continue in judgment of law, the property of the latter, and as such, are liable to capture during the voyage.(a)

§ 21. The same considerations apply, although not with equal force, as there do not exist the same grounds of suspicion, where the shipment is made in time of peace, but the consignor becomes an enemy before the completion of the voyage.

§ 22. In a case, in which a merchant in the United States ordered certain goods from Holland, which was, at that time, at war with England; but the Dutch merchant, instead of sending the goods to him directly, shipped them on his own account to a third person, and directed his correspondent not to deliver over the bill of lading unless payment was provided for in a satisfactory manner; it was held, that the goods, which were captured on the voyage, remained the property of the consignor, and as such were liable to be condemned.(b)

(a) *The Aurora*, (4 Rob. 218.) *The Noydt Gedacht*, (3 Rob. 137.) *The Josephine*, (4 Rob. 25.) *The Francis*, *Dunham & Randolph's Claim*, (8 Cranch, 354.) *The Venus*, *M'Gee's Claim*, (8 Cranch, 275.) *The Francis*, (1 Gallis, 450.) *The Merrimack*, (8 Cranch, 317.)

(b) A case cited by the court in *The Aurora*, (4 Rob. 219.) Vide also *the Merrimack*, *Kimmel & Albert's Claim*, (8 Cranch, 328.)

Here the legal title on the face of the papers was in the immediate consignee, as a mere trustee for the merchant who had ordered the goods ; but, as the consignee, by the instructions given him, was, in truth, the agent of the consignor, who, through him, retained a control over the goods that might have prevented their delivery, it was justly determined, that the title of the latter was not divested.

§ 23. So, where the goods were shipped, under a positive order from the claimant, but the shippers, with a view to their own security, had the bill of lading altered, so as to be transferable to their own order, Sir William Scott said, that it was impossible to distinguish the case from the other cases, in which the goods being still under the dominion of the shipper, and subject to his control, the property had been held not to be legally changed, and upon this ground, he condemned the cargo.(a)

§ 24. Shortly previous to the breaking out of the war between Great Britain and the United States in 1812, a merchant of Glasgow shipped several bales of goods to certain merchants in New-York, and both the bill of lading and the invoice were in the names of the latter, and expressed the shipment to be on their *account and risk*. It appeared, however, by a letter found on board, that the consignor, in making the shipment had exceeded the order he had received, so that the consignees were in effect,

(a) *The Aurora*, (4 Rob. 218.) Vide also the *Noydt Gedacht*, (2 Rob. 137, in notis,) in which Sir William Scott lays down the general rule, that a sale, made by an enemy to a neutral, during a war, must be absolute and unconditional. *The Josephine*, (4 Rob. 25.) *The Carolina*, (1 Rob. 304.)

released from any obligation to accept the goods, and by this letter he gave them an election to take the whole of the shipment, (part of which was made by another vessel,) or none, as they pleased, but required them to make their election within twenty-four hours after the arrival of either of the vessels. The goods were captured on the voyage, after war had been declared, by an American privateer, and were condemned by the Circuit Court at Rhode-Island, as enemy's property. The claimants, the New-York consignees, appealed to the Supreme Court of the United States, and their counsel on the argument contended, that it appeared clearly from the documentary evidence, that the property during the voyage belonged to them alone, and that the election given to them was merely a condition subsequent, which, until they decided to reject the goods, could not operate to divest their title. The court, however, said that they could not concur in this reasoning. That to vest the property in the claimants a contract was necessary, and to form this contract, the consent of both parties was indispensable. There was no evidence of such a contract. Had the consignor, in execution of the orders he had received, consigned to the claimants unconditionally such goods as they had directed, the contract would have been complete, and the property would have vested in them immediately on the shipment. But the consignor had not done this: with the goods ordered he had consigned other goods, expressly stipulating that the claimants should not take the goods ordered, unless they would receive all that were consigned. This was a new proposition which the claimants were at liberty to accept or reject; but until they accepted

it the property, of necessity, remained in the shipper. The sentence of condemnation was, therefore, affirmed.^(a)

§ 25. In another case of a capture, during the same war, which was also brought by appeal before the Supreme Court of the United States, the bill of lading expressed the goods to be shipped by a house at Liverpool, unto, and on account of, certain merchants at New-York, by whom they were claimed, and the invoice was signed by a manufacturer at Manchester, and described the goods to be consigned to the claimants, but did not specify on whose account and risk. In a letter, however, from this person, the shipper, to the consignees, enclosing the invoice, he said, "the goods are to be sold on joint account or on mine alone," and these expressions were relied on, by the captors, as conclusive evidence that the property was vested in the shipper alone who, at the time of the capture, was a public enemy. In delivering the opinion of the court, Mr. Justice Washington remarked that the question of law arose, in whom the right of property was vested at the time of the capture? That to effect a change of property, as between seller and buyer, it is essential, that there should be a contract of sale agreed to by both parties, and if the thing agreed to be sold is to be sent by the vendor to the vendee, it is necessary, to the perfection of the contract, that it should be delivered to the purchaser or to his agent, which, to many purposes, the master is considered to be. That there was no satisfactory evidence of any agreement between

(a) *The Francis, Dunham & Randolph's Claim*, (8 *Cranch*. 354.)
Wheaton on Capt. 89, 90.

the parties, and if there had been, yet, by the option given to the consignees, the delivery to the master was no more for their use than for the sole use of the shipper; it could have no effect to divest the property out of the shipper, until the consignees should elect to take the goods on joint account, or as the agents of the shipper; until this election was made, the goods were at the risk of the shipper, which was conclusive as to the right of property. The goods were accordingly condemned.^(a)

§ 26. It is a settled rule in the English admiralty, that, in time of war, the national character of property cannot be changed by a transfer from an enemy to a neutral, during its transportation, (*in transitu*.) That which was enemy's property at the inception of the voyage, retaining its character as such, remains liable to capture until its arrival at the port of destination.

§ 27. That such a transfer may be made, in the ordinary course of things, in time of peace, by a transfer of the bill of lading, accompanied by a contract of sale, so as effectually to bind the parties, is not denied or doubted. The rule, therefore, like that we have already considered, relative to the assumption of the risks of the voyage by a neutral consignor, varies from that of the common law; and, like that, its vindication is rested on the sole ground, that its adoption is necessary to the prevention of fraud. It is deemed a legitimate presumption, that the sole or principal motive of such transfers of enemy's property is, to rescue it from the hazard of hostile capture; and, it is insisted, that, to

(a) *The Venus*, Claim of Magee & Co., (8 *Cranch*, 275.)

admit their validity, would be to enable the enemy to retain and pursue the whole of his accustomed commerce, free from the pressure and molestation of the war.(a)

§ 28. Nor is the application of the rule confined to a transfer in actual war. If it appear that the immediate motive of the transfer, although made in time of peace, was the expectation of war; that this was the sole foundation of a contract, into which the seller would not otherwise have entered, and that this fact was known to the purchaser, the contract is held to be equally invalid, as against the belligerent, whose right of capture was meant to be evaded. In the judgment of Sir William Scott, there exists the same fraudulent intent, (*animus fraudandi*;) in both cases, and, therefore, both are justly subject to the same rule.(b) There exists, however, an apparent difference in the mode of applying the rule in these cases. In the latter, positive evidence of the intentions of the parties is plainly required; but in the first, the fact of a transfer is regarded as conclusive proof of the imputed fraud. In the reported cases, in which the rule has been enforced by Sir William Scott, he speaks of it as the established doctrine of the court, and it seems to have been adopted in its full extent by the Supreme Court of the United States.(c)

§ 29. It is obvious, that when the transfer of an enemy's property to a neutral, is ineffectual to save

(a) *The Vrow Margaretha*, (1 *Rob.* 336-7.) *The Carl Walter*, (4 *Rob.* 207.) *The Jan Frederick*, (5 *Rob.* 128.)

(b) Opinion of Sir W. Scott, in the *Jan Frederick*, (5 *Rob.* 133-4.)

(c) *The Frances*, (1 *Gall.* 445.) S. C. affirmed, (8 *Cranch*, 339. 354; 9 *Cranch*, 189. 1 *Kent's Com.* 87.

it from confiscation, an insurance upon the property, in favor of the neutral, must be void.(a)

§ 30. There is an important exception to the rule, that the ownership of property cannot be changed, after its shipment, which is material to be stated. Every consignor, not only at common law, but by a rule of the general mercantile law, has, in certain cases, a control over the shipment, which is technically called, a right of stoppage, *in transitu*; that is, a right to countermand the bill of lading, and re-possess himself of the goods, at any time after their shipment and before their arrival at their destined port;(b) and when this right is duly exercised, its effect, when the consignment is made from a neutral to an enemy, is to redeem the property from its liability to capture; and, on the other hand, by re-vesting the title, it restores that liability, when the consignment is made from an enemy to a neutral.

§ 31. There is, however, only a single case in which the right of stoppage, *in transitu*, can be legally exercised. Its only justifiable cause, is the expectation, confirmed by the event, of the insolvency of the consignee. Where an enemy consignor, from groundless fears, attempted to revoke the consignment, and alter its destination, it was held by Sir William Scott, that his proceedings, the

(a) Every insurance to which reference is made throughout this lecture, unless otherwise stated, means. an insurance made in the belligerent country having the right of capture.

(b) Abbott on Ship., Story's ed., 365. 1 Emer. ch. 11, § 3, p. 317, 19.) The *Constantia*, opinion of Sir W. Scott, (6 Rob. 324, 330.) Vide also, *Ellis v. Hunt*, (3 Term, 469.) *Oppenheim v. Russell*, (3 Bos. & Pull. 484.) *Dutton v. Solomonson*, (3 Bos. & Pull. 582.) *Coxe v. Harden*, (4 East, 211.)

fact of insolvency being clearly disproved, were ineffectual to change the rights of the consignee ; and by this decision, the property was restored to a neutral claimant, which otherwise, as that of an enemy, would have been subject to confiscation.(a) If a consignee, previous to the arrival of the goods, communicate to the consignor his intention not to receive them, and his determination not to pay for them, these facts are considered as equivalent to his actual insolvency, and give to the consignor an immediate election to exercise the right of a stoppage, *in transitu*. In a case thus circumstanced, in which this right was put in force during the voyage, by an enemy consignor, it was held by Sir William Scott, that his title was revested, and consequently, that the goods, as belonging to an enemy at the time of the capture, were justly liable to confiscation.(b)

§ 32. In the particular case, the shipper of the goods, after the refusal of the original consignee to accept them, sold them absolutely to another neutral merchant, and altered the consignment in his favor. The purchaser, who had not merely accepted, but had actually paid the bills drawn upon him for the price of the goods, was the claimant in the suit ; but his claim was rejected, on the ground, that a transfer, during the voyage, could not be permitted to change the hostile character, which the revendication of the goods by the shipper, had impressed upon them. This decision is another instance of the application of the general

(a) *The Constantia*, ut Sup.

(b) Note V. *The Twende Venner*, (6 Rob. 329,) in notia.

rule that has been stated, and a striking proof of the rigor with which it is enforced.

§ 38. There is another and a very reasonable exception from the rule that forbids the change of a hostile title during the voyage, that seems to be admitted in the English Admiralty. In fact, it is stated by Sir William Scott, in terms that plainly imply that it is the settled doctrine of the court. Where goods are shipped by an enemy consignor, to a neutral consignee, not under a prior order, but with the expectation that they will be received on the terms proposed, if they are, in fact, accepted by the consignee, previous to a capture, his acceptance vests and perfects his title, and upon proof of the fact, the property will be restored. In this case, as the goods, when shipped, were those of an enemy, and, as such, were liable to capture until the acceptance, they are saved solely by a change of title during the voyage ; but there is no transfer liable to the suspicion of having been made with an intent to evade the rights of capture, since the intention, that the property shall belong to the consignee, exists at the inception of the voyage. Nor can it be doubted, that the effect of the acceptance is, to throw the whole risks of the voyage on the consignee from its commencement ; and hence the transaction is reasonably construed in the same manner, as if the goods had been originally shipped on his account and risk, so as to vest his title by their delivery to the master. The acceptance, however, to exempt the property from capture, must, doubtless, be absolute and unconditional, leaving in the shipper no other right or control

over the property than that of stoppage *in transitu*.^(a)

§ 84. It is not merely by an actual transfer, that a change in the hostile character of property on the ocean is prohibited. The character, once impressed, remains indelible ; for it is not effaced even by a change, wholly reversing the national character of the owner. If he was an enemy at the commencement of the voyage, although previous to the capture he may have become a subject of the capturing power, owing allegiance, and entitled to protection, this inexorable rule suppresses his complaints, and refuses to unloose the grasp of confiscation.

§ 85. During the existence of a war between England and Holland, a ship originally Dutch was captured on a voyage from Batavia to Holland. She was owned and claimed by merchants residing at the Cape of Good Hope, who, when the voyage commenced, were Dutch subjects ; but nearly two months previous to the capture, the colony of Good Hope had capitulated to a British force, and under the capitulation, the inhabitants had sworn allegiance to the crown, and had become British subjects. Even these facts were deemed insufficient to sustain the claim of the owners. Their ship was condemned on the sole ground, that having "sailed as a Dutch ship, her character during the voyage could not be changed."^(b)

§ 86. It is evident, that the rule, in its application to a case like this is purely arbitrary, since the

(a) *Cousine Marianne*, (1 *Ed. Ad. R.* 346.) Vide Note V.

(b) *The Danckebaar Africaan*, (1 *Rob.* 107.) *The Herstelder*, (1 *Rob.* 113.)

reasons by which alone it is justified, when applied to a voluntary transfer of property, no longer exist. It is also obvious, from the report of the case, that Sir William Scott, in pronouncing his decision, was wholly governed by the controlling authority of a prior decision of a superior tribunal, the lords of the privy council.^(a) Upon this prior decision, of which he expresses no approval, and which he omits to sustain by a single reason, he rested entirely his own decision, and his language in doing so, reveals expressively the state of his mind. "I am bound down by the decision of the lords, and, therefore, I think myself obliged to condemn." Although the principle of the decision must doubtless be considered as the established law of the English admiralty, it is difficult to believe, that a rule which sanctions the confiscation by a government of the property of its own subjects, without the imputation of guilt or crime, will ever be regarded as a just exposition of the law of nations.

§ 37. In order to decide the question, whether captured property belongs to an enemy, it is necessary, in some cases, to ascertain the national character of the territory where the owners resided at the inception of the voyage, since the character of a territory, as hostile or neutral, necessarily determines that of its inhabitants.

It is established by the law of nations, that a mere cession by treaty of a province or territory by one power to another, can never operate by itself as an immediate transfer of the allegiance of the

^(a) Note VI. *The Negotie en Zeevaart*, stated by Sir W. Scott, (1 Rob. 111.)

inhabitants. To produce this effect, a solemn delivery of the possession by the ceding power, and an assumption of the government by that to which the cession is made, are indispensable. Until then the inhabitants remain the subjects of the power to which their allegiance was originally due.

§ 38. In a case, where the property was claimed as belonging to a neutral merchant of New-Orleans, and was captured on a voyage from that port, the question, whether it was liable to be condemned, could only be determined by ascertaining, whether the claimant was a French, or Spanish subject, at the inception of the voyage. In other words, whether Louisiana then belonged to France or Spain. If to France, the property, as hostile, was to be condemned. If to Spain, as neutral, to be restored. It was admitted, that long previous to the sailing of the vessel, the province of Louisiana, by a solemn treaty, (*St. Idelfonso*, 1796,) had been ceded by Spain to France; but the evidence of an actual delivery of the possession to any French authorities, and an actual exercise by them of the powers of government, was deemed by Sir William Scott, to be wholly insufficient and unsatisfactory. He, therefore, decreed the restoration of the property. (a)

§ 39. The occupation of a territory by a military force, is usually regarded as temporary, and until it is confirmed by a formal cession, or by a considerable lapse of time, it is not permitted to change or affect the national character of its inhabitants. But when such an occupation proceeds from a

(a) *The Fama*, (5 Rob. 106.)

power in amity with that to which the country belonged, and takes place with the evident concurrence of those acting under the authority of the latter, the surrender will be deemed voluntary, and is sufficient to found a presumption of a prior and formal cession. It, therefore, transfers the allegiance, and necessarily changes the national character, of the country and its inhabitants.

§ 40. A cargo, libelled by the captors, appeared from the documents, to belong to merchants residing in the Seven Islands, (the Ionian Republic,) and the question was, whether these islands, at the time of the capture, belonged to Russia or to France. The treaty of cession, from Russia to France, could not be proved, but these powers were then at peace; and it appeared in evidence, that some months previous to the capture, French troops had taken possession of the islands, under a claim of title by cession from Russia, and that part of those troops had been conveyed thither, on board of, and under the protection of, Russian ships. It was held by the learned judge of the admiralty, that these facts sufficiently proved a voluntary surrender on the part of Russia, in consequence of a previous cession, and repelled the supposition, that the occupation of the islands was hostile and temporary. The cargo, therefore, as belonging to the subjects of France, at the time of the capture, was condemned as enemies' property.(a)

§ 41. Where an insurance was made on the property of merchants resident at Hamburgh, which at the time the contract was made, and at the time of the loss, was in the possession of French troops,

(a) *The Bolletta*, (1 *Ed. Ad. R.* 171.)

it was held by the Court of King's Bench, in entire conformity with the established doctrine of the admiralty, that the insurance was valid, as it appeared in evidence, that notwithstanding the military occupation of Hamburgh, by an overwhelming force, all the powers of the civil government continued to be administered by the native authorities, in the same manner as before the arrival of the French ; and Lord Ellenborough remarked, that he knew of no case, where a country, maintaining its civil government *proprio jure*, has been held to be conquered. It is true, that the judgment in this case, was partly founded on an order in council, by which a trading with Hamburgh was deemed to be legalized, but it is evident, from the reasoning of the court, that the same decision would have been made, had no such order been given in evidence.(a)

§ 42. It is not to be inferred from the preceding cases, that the occupation of a territory by the troops of an enemy, is in all cases to be regarded as purely military and temporary, so that, unless the possession is confirmed by a treaty of cession, the national character of the inhabitants, during the war, remains unchanged. Where the territory is reduced to a state of entire subjection ; where its forcible occupation is in effect a conquest, by virtue of which, all the powers of the civil government are claimed and exercised by the conqueror, the allegiance of the inhabitants is of necessity transferred to the hostile government, and this transfer of their allegiance at once impresses them with a hostile character—for although, acquisitions made [during

(a) *Hagedorn v. Bell*, (1 M. & S. 450.) Vide also *Bromley v. Heselstine*, (1 Camp. 75.) *Bentzon v. Boyle*, (9 Cranch, 191.) Note VII.

a war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government. This doctrine is plainly to be deduced from the decision of the King's Bench, to which I last referred, is implied in many of the judgments of Sir William Scott, and has been confirmed by an express decision of the Supreme Court of the United States.^(a)

§ 43. Although the hostile character of property is not permitted to be varied during the voyage, so as to exempt it from confiscation, we are not to infer, that its character, as neutral or friendly, may not be so effectually altered, as to insure its condemnation. Whatever was the character of the owner when the voyage commenced, if he is an enemy at the time of capture, the seizure is lawful, and confiscation a necessary consequence. It is the legal or constructive ownership of property, at the time of seizure, that determines its character and fate. The rights of the captors are then vested, nor can they be divested, by any subsequent change in the national character of the owner. Previous to an adjudication, he may have become a neutral, an ally, a subject ; but in neither capacity can he reclaim the property, of which, as an enemy, he was, by the law of war, justly deprived. Nor, to warrant a condemnation, is it in all cases necessary, that the owner of the property should have been an actual enemy at the time of capture or seizure. If the seizure is provisionally made,

(a) *Bentzon v. Boyle*, (9 *Cranch*, 195.)

in contemplation of war, a subsequent declaration of hostilities has a retroactive effect ; it converts the precautionary seizure into an act of positive hostility, and, from that time, the neutral or friendly owner, into a public enemy.

§ 44. These principles are fully illustrated, in the remarkable case to which I shall next refer.

The colony of Demarara, which, during the previous war, had been in British possession, by the treaty of Amiens, was receded to Holland ; and, during the delusive calm that followed this treaty, when peace (in the language of Sir William Scott,) “half smiled upon the world,” it was fully restored to the Dutch possession. It was during this possession, and before the interruption of peace, that the property in question, which was owned by resident merchants of Demarara, was shipped from that colony, and the voyage commenced nearly two months before the renewal of hostilities between England and France. On the day that war was declared, a provisional order of council was issued, for the detention and seizure of Dutch property—and this order was in force, when the property was captured. About a month after the seizure, war was proclaimed against Holland ; and in the interval between this declaration, and the hearing of the cause, Demarara again capitulated to a British force, and under the capitulation, the inhabitants again became British subjects. Under these circumstances, it was ingeniously contended, by the counsel for the claimants, the Dutch owners, that, as the property was not enemies’ property, either at the time of sailing, at the time of seizure, or at that of adjudication, it must, of necessity, be restored ; and that, even admitting the original

seizure to have been hostile, still, as the claimants had again become British subjects, they were entitled, as such, to claim a restitution. These defences were, however, repelled by Sir William Scott, and overthrown by an irresistible force of argument. He did not deny, that the claimants were friends at the inception of the voyage ; but he denied that they could be so considered at the time of the seizure. The declaration of war, he said, had a retroactive effect, applying to all property, previously detained, and rendering it liable to be considered as the property of enemies, taken in time of war. The first seizure was provisional, and was an equivocal act. If the matter, in dispute, had terminated in a reconciliation, it would have been converted into a mere civil embargo. Such would, then, have been the retroactive effect ; but, as the transaction ended in war, the retroactive effect was exactly the other way, and impressed a direct, hostile character upon the original seizure. It was no longer an equivocal act, subject, as such, to two interpretations. There was a positive declaration that the original intent was hostile, and, consequently, the measure must be regarded as hostile in its origin. As to the position that the claimants, having become British subjects, were entitled, as such, to restoration, it could not be maintained for a moment. It was contradicted by all experience and practice, even in the case of those who had an original British character ; the rules and the practice were universal, that, where the property is taken in a state of hostility, it is subject to condemnation, although the claimants had become friends and subjects prior

to the adjudication.(a) The case involved other questions not necessary to be mentioned ; but the property was condemned upon the grounds that have been stated.

§ 45. It has already been intimated, that, where a foreigner, who is insured, becomes an enemy before the termination of the risks described in the policy, the effect of the war is to discharge the insurer from subsequent losses, but not to render the contract void in its origin. The insurer continues liable for all losses that occurred prior to the commencement of hostilities, although the right of the assured to prosecute for a recovery, in consequence of his personal disability as an alien enemy, is suspended during the war. These reasonable distinctions are clearly established by a decision of the Court of King's Bench, and the principle of the decision seems to be applicable to all cases in which the contract of insurance is valid in its execution, and becomes illegal, solely from subsequent events.(b)

§ 46. The transfer, in time of war, of the vessel of an enemy to a neutral, is a transaction, from its very nature, liable to great suspicion. It is, consequently, examined, and sifted in a court of admiralty with a jealous and sharp vigilance, and is subjected to rules of a peculiar strictness.

Previous to the French revolution, the ancient

(a) *The Boedes Lust*, (5 *Rob.* 233–250,) what is given in the text, is a very condensed statement of the elaborate opinion of Sir William Scott, but his language, as far as possible, is retained, and his meaning certainly exhibited. Vide also, *The Diana*, (5 *Rob.* 60.)

(b) *Flindt v. Waters*, (15 *East*, 260.) Vide Note II. *Harman v. Kingston*, (3 *Camp.* 152,) is a decision, at *Nisi Prius*, of Lord Ellenborough, to the same effect.

government of France, at different times by special ordinances, prohibited such transfers from being made at all, and declared them of no validity to protect the property from capture. Within the present century, the government of England, in similar disregard of the rights of neutrals, was misled to follow, in an order of council, the vicious example. Ordinances of this character are not to be regarded as forming a part of the law of nations. On the contrary, as unnecessary and unjust in themselves, they are directly repugnant to the principles upon which that code of equity and reason is founded. They are, consequently, not binding on the prize courts even of the country by which they are issued. A court of admiralty, sitting as a court of prize, is not a municipal tribunal. The law which it is bound to administer, is derived from the law of nations, or the special provisions of treaties, and all municipal regulations, in contravention of the rules thus established, it must violate its duty, or disregard.(a)

Although the purchase of ships, (which, by a general usage, are an article of commerce,) is a branch of trade, in which neutrals, when they act with good faith, have a perfect right to engage, and which, consequently, the belligerent powers are not justified in attempting to prohibit by a sweeping interdiction; yet, where the sale is made by an enemy to a neutral, it is not unreasonable, that its motives, nature, and terms, should be made an object of searching inquiry in the prize courts of the

(a) Report in answer to Prussian Memorial. Answer to 4th proposition. Wheat. on Capture, Appendix, p. 386. The observations of Sir W. Scott in the *Maria*, (1 Rob. 349 a.) Vide Note VIII.

opposite belligerent. Nor have I seen any reason to dissent from the propriety or justice of the rules on this subject, which, as collected from the decisions of Sir William Scott, are now the established law of the English Admiralty.

§ 47. The sale of an enemy's vessel to a neutral purchaser, to be valid, must, in all cases, be absolute and unconditional. The title and interest of the vendor must be completely divested. If there is any covenant, condition, or agreement, by which he retains any portion of his interest, it vitiates the entire contract; and these rules, it is asserted, are such as reason and common sense suggest, in order to guard against collusion and cover.

Thus, where the neutral vendee was bound by a condition, to restore the vessel at the conclusion of the war, as the immediate pressure of hostilities was evidently the sole motive of the transfer, it was justly held to be colorable and void;(a) and the same construction was given to the contract when the vendor retained a lien upon the vessel, for the whole, or a large portion of the purchase money.(b) Even where the sale is ostensibly absolute, yet if the vessel continue under the control and management of her former owner, and in the same trade and navigation, in which she was previously employed; these circumstances are deemed conclusive evidence of a fraudulent intent, to cover, under the name of a neutral, the property of an enemy, and the contract is necessarily adjudged to be invalid.(c)

(a) *The Noydt Gedacht*, (2 Rob. 137,) in notis.

(b) *The Sechs Geschwistern*, (4 Rob. 100.)

(c) *The Vigilantia*, (1 Rob. 1.) *The Embden*, (1 Rob. 16.) *The Jemmy*, (4 Rob. 31.) Vide also, *the Argo*, (1 Rob. 158,) in which, it was

§ 48. Nor is it merely in the cases that have been stated, that a transfer by sale, is deemed to be ineffectual to protect the vessel from capture as enemy's property. The motives and object of the purchase are very reasonably inferred from the subsequent employment of the vessel. If the neutral vendee, although residing himself in a neutral country, continues to employ the vessel constantly and exclusively in the trade of the country to which she belonged ; if the vessel in all her voyages, sails, and is fitted out, from a port of that country, and returns to such a port to deliver her cargoes, she becomes thoroughly incorporated in a hostile commerce, and is as truly to be deemed a ship of the country from which she is thus navigated, as if she evidently belonged to its inhabitants. The inference from these circumstances is not to be resisted, that the sole object of the transfer was to enable the vessel to carry on the enemy's trade, without a liability to capture, and consequently that the sale was a meditated fraud upon belligerent rights.^(a) Nor is such an employment of the vessel by a neutral vendee, held to be excused by the fact, that there was no port in his own country, to which, as a home port, the vessel could return. In answer to the excuse, it was said by Sir W. Scott, that if a neutral choose to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of the speculation. If there are no ports

held, that where a ship is purchased in a belligerent country, by an agent of a neutral, the letters of procuration, constituting him such agent, must be produced and proved.

(a) *The Vigilantia* and *Emden*, ut sup. *The Vrow Hermina*, (1 Rob. 163.)

in his own country, the ports of other neutral countries are open to him ; and if he confines himself exclusively to the trade and navigation of an enemy's country, he is liable to be considered as an enemy, in respect to the vessel so employed. (*a*)

§ 49. If an enemy's ship of war seeks a refuge in a neutral port, and, finding it impossible or difficult to escape, is there sold, the sale is deemed to be a fraud upon the opposite belligerent, and is unavailing to protect the ship from future capture. The principle of the decision seems equally to apply to the merchant vessels of the enemy, sheltering themselves from hostile pursuit, in a neutral port, and, from the impossibility of escape, there sold ; but it is intimated by Sir William Scott, that, by prior decisions, a distinction had been established in their favor, and the validity of the purchase, in such cases, sustained. (*b*)

§ 50. Several cases remain to be noticed, in which the special circumstances, without reference to the actual ownership, fix conclusively a hostile character upon property captured, and lead inevitably to its condemnation.

§ 51. If a neutral ship sail under the flag, and with the pass of the enemy, she is bound by the character she assumes. The owner who seeks a benefit by such means—and some advantage must be contemplated—must take the consequences of the peril to which they expose him. He is not allowed to contradict his own acts, and redeem his vessel from confiscation, by a disclaimer of the hos-

(*a*) *The Endraught*, (1 *Rob.* 18, 19.)

(*b*) *The Minerva*, (6 *Rob.* 399.) Cases in note.

tile character which, with a view to his own interests, or those of the enemy, he had elected she should bear. (a)

A vessel, sailing under the flag or pass of another country than that to which she belongs, is in all cases, subject to a double inconvenience. While the owners are not permitted to aver her real character, in order to shield her from a condemnation, her assumed character affords her no protection against the rights of captors. Her real character may always be pleaded against her, where the knowledge of the fact would justify a condemnation. (b)

§ 51. But, although the belligerent flag and pass are, in all cases, decisive as to the ship, they are not, in all cases, conclusive on the cargo. In England, the principle has never been carried to this extent; but a distinction between ships and goods has always been allowed. The ship is bound by the character imposed upon it by the authority of the state, from which the documents issue: but goods which have no such dependence upon the authority of the state, are differently considered. If goods, belonging to a neutral, are laden, in time of peace, on board a vessel bearing a foreign flag and pass, and, for purposes having no relation to a future war, are themselves clothed with a foreign character, although the breaking out of hostilities will impress upon the vessel an enemy character, from which she cannot be redeemed, yet the owner of the goods is not concluded. He is admitted to

(a) *The Vigilantia*, opinion of Sir W. Scott, (1 Rob. 13.) *Barker v. Phoenix Ins. Co.* (8 Johns. 321.) *Sleight v. Rhinelanders*, (2 Johns. 531.) *The Vrow Elizabeth*, (5 Rob. 5.) *The Ann*, (1 Dod. Ad. R. 221.)

(b) *The Success*, (1 Dod. 132.)

disprove the colorable title, and, upon due proof of his neutral character and actual ownership, his property is restored. To insure, however, this favorable consideration of goods bearing, apparently, a hostile character, the shipment must not only be made in time of peace, but, plainly, not in contemplation of war ; for if the design of the cover was to protect the goods from hostile capture, they are, doubtless, liable to be condemned.(a)

§ 52. There is still another case necessary to be noticed, in which goods, of which the true character is concealed by simulated papers, and which are laden, in time of peace, on board a vessel that becomes an enemy, although belonging to a neutral, are subject to capture and confiscation. When a neutral engages in a commerce which is exclusively confined to the subjects of another country, and is interdicted to all others, and cannot be carried on at all in the name of a foreigner, such a commerce is considered so entirely national that it necessarily follows the situation of the country, and the property thus incorporated into its commerce, partakes its character. The property may be neutral, in fact ; yet, as it bears the national character of the commerce in which it is involved, that character, when hostile, will induce its confiscation. This doctrine is fully established by repeated decisions of Sir William Scott, and it is distinctly admitted by Mr. Justice Story, that neither the principle or sound policy of those decisions can justly be questioned ; and that, when such is the nature of the trade, it is quite immaterial whether the goods

(a) *The Vreede Scholtys*, (5 Rob. 5, in notis.) *The Ann Green*, opinion of Mr. J. Story, (1 Gall. 286, 287.)

be shipped in peace or in war. To such cases the general rule applies without exception or relaxation, that a party who undertakes to cover his property with a foreign character, is bound, and must abide, by its consequences.(a)

§ 54. There are some cases, in which the goods shipped, although no cover is sought, nor disguise practised in relation to them, are yet impressed from their origin and quality with a hostile character, which the different character of their owner is not permitted to efface. He may be a neutral or a subject, and yet the goods, as enemy's property, be liable to condemnation: Where the goods are the produce of an estate or plantation in an enemy's territory or colony, the principle is said, by Sir William Scott, to be established and fixed by many decisions, that the possession of the soil impresses upon the owner, the character of the country, so far as the produce of his estate is concerned. Whatever may be his local residence, he is considered as an enemy, in respect to that produce, which, therefore, in its course of transportation to another country, is liable to capture, as enemies' property. The ground of the rule is, that the proprietor, as a holder of the soil, has incorporated himself with the permanent interests of the nation; and hence the rule applies even where the produce has been shipped in time of peace.(b)

(a) *The Princessa*, (2 Rob. 49.) Sir W. Scott's opinion. *The Anna Catharina*, (4 Rob. 109.) *The Rendsborg*, (4 Rob. 121.) *The Susa*, (3 Rob. 256.) *The Ann Green*, (1 Gall. 290.) Story, J., 289-90. *The San Jose Indiano*, opinion of Story, J., (2 Gall. 285-6.)

(b) *The Phoenix*, (5 Rob. 20.) *The Maastrom*, and *the Juffrow Catharina*, cited by Sir W. Scott, (5 Rob. 21.) *The Vrow Anna Catharina*, opinion of Sir W. Scott, (5 Rob. 167.)

The rule has been adopted and followed by the Supreme Court of the United States, and was enforced to the condemnation of the property, in a case where the proprietor, the claimant, had acquired his estate while the colony, a West India island, in which it was situated, belonged to a friendly power. The island subsequently passed, by capitulation, into the possession of England, and it was deemed a conclusive ground of condemnation, that the territory was hostile when the produce was shipped.(a)

§ 55. The nature of the service or employment in which a vessel is engaged, is very justly deemed, in some cases, conclusive evidence of its hostile character. A neutral owner, who has suffered his vessel to be employed by a belligerent power, or its officers, for purposes immediately or mediately connected with the operations of the war, if the vessel is captured in the employment, is never permitted to assert his claim. The vessel, while thus employed, was as truly a vessel of the enemy, as if she had been such by the documentary title; nor can the owner for his protection divest her of the hostile character that she bore at the time of seizure.

§ 56. A Swedish vessel, that, during a war between England and France, had been used as a transport for French troops, and was captured while she was still under French control, upon the disclosure of the facts in evidence, was promptly condemned; nor would the court listen to the plea, that the service, in which the vessel was engaged, was involuntary—that she had been impressed into it by duress and violence. The answer given to

(a) *Bentzon v. Boyle*, (9 *Cranch*, 191.)

such a defence, is conclusive. When threats or force are employed for such a purpose, by a belligerent, it is the duty of a neutral master, who has not the means of resistance, to surrender his vessel, as to a hostile seizure, and, denouncing its illegality, appeal to his own government for redress. He has no right, retaining the command, to navigate his vessel as a neutral, in the service, and *subject to the orders, of the enemy.*(a)

§ 57. In a subsequent case, in which the vessel was captured while engaged in a hostile service, having on board military persons belonging to the enemy, it was argued, that the master was ignorant of the character of the service, and that, in order to support the penalty of confiscation, it was necessary that there should be some proof of delinquency in him or his owners. But Sir William Scott repelled the argument. He held, that the knowledge, or privity, of the master, or his owners, was not necessary to be shown; but that it is sufficient, if there is an injury arising to the capturing belligerent, from the employment in which the vessel is found. When imposition is practised to entrap a neutral vessel into a hostile service, it operates as force, and redress in the way of indemnification must be sought against those, who, by means either of compulsion or deceit, have exposed the property to danger. Were a different rule established, the opportunities of neutral conveyance would be constantly used by the enemy, with impunity, since it would be almost impossible, in the greater number of cases, to prove the knowledge or privity of the immediate offender.(b)

(a) *The Carolina*, (4 Rob. 256.)

(b) *The Orozambo*, (6 Rob. 430.) Opinion of Sir W. Scott, p. 434, 5.

§ 58. In another case, another vessel, having on board 90 French mariners, who were shipped by the direction of the French minister in the United States, was captured on her voyage from Baltimore to Bordeaux, and condemned as a transport in the enemy's service. It was insisted, that there was no evidence that the French mariners were to be immediately employed in military service, and, consequently, that the vessel could not be properly regarded as a transport. But the learned judge overruled the defence, with the decisive remarks, that the shipping of men in detachments, and the conveyance of stores from one place to another, is an ordinary employment of transport vessels; and that the distinction was totally unimportant, whether this or that case is connected with the immediate active service of the enemy. In removing forces from distant places, there may be no intention of immediate action; but still, the general importance of having troops conveyed to places where it is convenient they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels. He, therefore, discarded the distinction relied on, that the mariners on board were not going on an immediate expedition. It was enough, that they were military persons, and their transportation, the act of their government. If it was asked, whether the court would lay down a principle that might be carried to the length of preventing a military officer, in the service of the enemy, from finding his way home, in a neutral vessel, from America? the reply was, that if he was going merely as an ordinary passenger, as other passengers, and at his own expense, neither that court, nor any other British tribunal, had ever laid

down the principle to that extent ; but the case under adjudication, was differently composed. It was the case of a vessel letting herself out in a distinct manner, under a contract with the enemy's government, to carry a number of persons, described as being in the service of the enemy, with their military character travelling with them, and to restore them to their own country in that character. The court, therefore, with perfect satisfaction of mind, and without hesitation, pronounced the condemnation of vessel and cargo.(a)

§ 59. Nor is it merely by the transportation of military persons and stores, that a neutral vessel may place herself in the service of the enemy state, so as to forfeit her own character, and render herself liable, as an enemy, to confiscation. The conveyance of public despatches, which are defined to embrace all official communications of official persons on the public affairs of the government,(b) is considered, in some cases, a highly criminal act, that will infect the vessel, and all the property of the owners, with its noxious consequences. The mere fact, that such despatches are found on board a vessel, is not sufficient to produce her condemnation. They may be in the exclusive possession of a passenger ; their existence on board may not be known or suspected by the owner or master, and, where no guilt or misconduct is imputable to the owners or their agents, their property is safe from confiscation.(c) But when the despatches are knowingly

(a) *The Friendship*, (6 Rob. 420.) Opinion of Sir W. Scott, p. 426-8-9.

(b) Opinion of Sir W. Scott, *The Caroline*, (6 Rob. 465.)

(c) *The Rapid*, (1 Ed. 228.)

received by the owner or master, and, more especially, when an attempt is made to conceal or suppress them, to withhold them from the knowledge of the capturing force or of the prize court, these acts are deemed to be fraudulent, and are held to justify a condemnation, not only of the vessel, but of all the property of those who, directly or through their immediate agents, are chargeable with privity or knowledge. (a) The knowledge of the owners, or of the master, works, in all cases, the condemnation of the vessel; but the misconduct of the master will not affect the goods, even of the owners of the ship, if they are entirely innocent, and the goods are not subject to his control as consignee or supercargo. In his mere capacity of master, he is not the agent of his owners in respect to the cargo. (b)

§ 60. The propriety of enforcing the rules that have been stated, particularly in their application to the conveyance of despatches in time of war, from a colony of the enemy to the mother country, is vindicated by Sir William Scott, with his usual force of language, and strength of argument. It is obvious, he remarked, that this service—the carrying of despatches from a colony to the mother country—is highly injurious to the other belligerent. In the present state of the world, when hostilities break out between the powers of Europe, it is an object of great importance to preserve the connection between the mother country and her colonies; and on the part of the other belligerent to interrupt

(a) *The Caroline*, (6 Rob. 461.) *The Atalanta*, (6 Rob. 440.) *The Constantia* and *the Susan*, (6 Rob. 461, in notis.)

(b) *The Hope*, (6 Rob. 463, in notis.)

that connection, is one of the most energetic operations of war. The importance of keeping up that connection for the concentration of troops, for various military purposes, and even for civil assistance and support, is manifest. It may be the necessary means of preventing by a surrender, the loss of the colony. In time of peace, the intercourse with the mother country is kept up by ships of war, or by packets in the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in, who lends himself to effect the same purpose, under the privilege of an ostensibly neutral character, places himself, in fact, in the service of the enemy state, and is justly to be considered in that character. Nor let it be supposed, that this is an act of light and casual importance. The consequence of such a service is indefinite—infinately beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores, is necessarily an assistance, of a limited nature; but in the transmission of despatches, may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent, in that quarter of the world. It is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy. The service, therefore, of carrying despatches, in whatever degree it exists, can only be considered in one character—as an act of the most noxious and hostile nature.(a)

§ 61. There is an important exception to the general rule, that the carrying of despatches is a hos-

(a) *The Atalanta*, opinion of Sir W. Scott, (6 *Rob.* 454, 5.)

tile service, that impresses a hostile character on the vehicle of transportation. The despatches of an ambassador from an enemy state, resident in a neutral country, are not considered to fall within the reasoning on which the general rule is founded. There is no antecedent probability that they relate to the operations of the war, or convey any information that can tend to defeat the plans of the opposite belligerent. The presumption is, that they relate solely to the transactions of the ambassador, with the neutral government. That they are, therefore, innocent in their nature, as designed to maintain a pacific connection. It is, also, to be observed, that an ambassador is, in a peculiar manner, an object of the protection and favor of the law of nations. When he has been admitted, in his representative character, and is in the discharge of the functions of his office, in a neutral state, he has thrown off, in a measure, his hostile character. He has become a sort of middle-man, entitled to peculiar privileges, as set apart for the protection of amity and peace, in maintaining which, all nations are, in some degree, interested. In the decision of such a question, some consideration is also due to the convenience of a neutral state. Its interests may require, that the intercourse of correspondence between the ambassador and his government should not be wholly interdicted. To debar him from the only means of communicating with his government, would almost amount to a declaration, that an ambassador from the enemy shall not reside in a neutral state at all. It is for these reasons, that the despatches of an ambassador in a neutral state may be lawfully received for transportation by the owner or master of a neutral vessel. Their

mere conveyance, where no fraud or concealment is practised, is no violation of neutral duty, and, consequently, implies no surrender of the neutral character. It is true, the vessel carrying the despatches is liable to the inconvenience of being brought in for examination, since the captors have an undeniable right to intercept the papers, and examine their nature and contents ; but, although the vessel is liable to this detention and the necessary expenses attending it, she is in no case, subject to the penalty of confiscation.(a) I add that, an insurance upon such a vessel, made in a belligerent country, in which she is brought by the captors, as there is no illegality in the voyage, or in her subsequent conduct, would be certainly valid ; nor do I perceive any reasons for doubting that the insurers would be responsible under the general terms of the policy, for any incidental loss resulting from her detention.(b)

(a) *The Caroline*, (1 *Rob.* 461.) Opinion of Sir W. Scott, p. 464,—469. Vide also the *Madison*, (1 *Ed.* 224,) in which it was held, that despatches from a hostile government to its minister, resident in a neutral state, are also innocent, and exempt from the general rule. *The Commercen*, (1 *Wheat.* 382.) Vide Note IX.

(b) *Post*, *Lec. V.* § 49, note.

PROOFS AND ILLUSTRATIONS.

NOTE I.

P. 417, § 5. The Spanish translation of the Ordinance of Barcelona, 1484, of Capmany, contains an express prohibition of insurances upon the ships or goods, of the enemies of the king of Spain, and of friends jointly interested with enemies; but a subsequent clause, by a singular exception, permits such insurances to be made when the goods are laden at, or the ships sail from Barcelona. (*Capmany, Appen.* p. 81, 82.) It is remarkable that the Italian translation of Casaregis omits the general prohibition, and retains only the exception. (*Casar. Il. Conso.* p. 183, cap. 5.)

Le Guidon says, that the goods of an enemy can never be insured, unless they are protected by a license from the crown, and that even in this case, the insurers are not liable under the general terms of the contract, but the fact must be specially stated, and the license expressed in the policy. (*Cleirac Us. & Cout.* p. 196. *Le Guidon*, ch. 5.)

There is no reason to doubt that the rule, as stated by Le Guidon, has always obtained in France. Valin cites two ancient ordinances, (of 1543 and 1584,) that proscribe absolutely all commerce, direct or indirect, with public enemies; and he justly remarks that the invalidity of every insurance upon enemies' property, is a necessary consequence of this interdiction. In England, however, (he proceeds to observe,) the insurance of enemies' property was not considered, as prohibited by that interdiction of commerce, which follows a declaration of war, "for they constantly, during the last war, (that which terminated by the peace of 1763,) insured our ships and cargoes whether they were destined for France,

or her colonies, the ports of her allies, or those of neutrals. It is true, (he adds,) this did not prevent our ships when taken being declared good prize; but the consequence was *that one part of the nation restored to us by the effect of insurance, what the other took from us by the rights of war.* (2 *Val.* 32, liv. 3, tit. 6, art. 3.) This language, Mr. Marshall observes, "borders a little upon derision; it is something more; it is the undisguised sneer of a Frenchman at the simplicity of the English. (1 *Marsh.* 33. Vide also *Emerigon*, ch. 4, § 9, vol. i. p. 128. *Pothier*, n. 45.)

The Hanse Towns, by the special favor of the Emperors of Germany, seem to have been a remarkable exception from the general practice of Europe. The wars of the empire imposed no shackles upon their commerce. They were permitted to trade with the enemy as in time of peace. Consequently in these cities, insurances upon enemies' property were doubtless valid. (1 *Benecke*, 46, cap. 1, § 4.)

Bynkershoek, (*Quæ. Juris, Pub. Lib.* 1, c. 21,) in a chapter devoted to the subject, discusses, with great ability and a conclusive result, the questions both of the legality, and of the policy of insurances upon enemies' property, and upon both grounds explicitly condemns them. It is truly observed, by his learned translator, that the irresistible arguments which he has adduced had a material influence on the subsequent decisions in England, and that this is not the only instance in which this eminent jurist has had the honor of giving the law to the tribunals of Europe." (*Duponceau's Bynkershoek*, p. 167, note.) The substance of the reasoning of Bynkershoek is incorporated in the text, and is summed up in the necessary answer to his pregnant question, "*Hostium pericula in se suscipere, quid est aliud, quam eorum commercia maritima promovere?*"

Bynkershoek supports his opinion, that insurances on enemies' property are unlawful, by a reference to several edicts of the States General; yet it is a remarkable fact, that the Ordinance of Amsterdam, which was passed in 1744, the year after his death, expressly declares that its provisions shall apply to all insurances effected in that city, "whether the interest and risk be on account of inhabitants, or strangers, friends or enemies, (*Ordin. of Amster. Art.* 40. 2 *Mag.* 143,) and it is upon this provision that Benecke

founds the assertion that such insurances are permitted in Holland. The words of the Ordinance seem to admit no other construction ; yet it is possible that they may have been differently construed in the Courts of Holland, or the provision as extending to enemies' property declared void. It is difficult to understand how an ordinance of the city of Amsterdam could be valid in opposition to what Bynkershoek had shown to be the public law of the United Provinces.

It appears from Baldasseroni, that insurances upon enemies' property, where the insurance was made upon "account of whom it may concern," *per conto di chi spetta*, were formerly held to be valid in Italy. He refers to decisions to that effect, of the tribunals of Pisa and Florence, (*Baldass. Assecur. Mar. tom. 1, p. 230.*) I infer, however, from the language of Benecke, that this discrepancy between the municipal law of Italy, and the general law of Europe, no longer exists. The reader may also consult on the subject of this note, 3 *Kent's Comment.* 5th ed., 253. 255. 2 *Wheat. Inter. Law*, 37. 39.

NOTE II.

P. 420, § 9. It is not at all surprising, that the opinion so long prevailed in England, that insurances on enemies' property were lawful ; for the actual decisions, if they did not in terms establish, plainly recognised their legality. The object of this note is to state the substance, progress and result of the decisions ; and as the illegality of insurances upon enemies' property, and upon a trading with the enemy rest substantially upon the same principle, both classes of cases will be given.

In *Henkle v. Royal Ex. Assur. Co.* (1 *Ves. sen.* 318,) Lord Hardwicke used this language :—"There has been no determination that insurance on enemies' ships during a war, is unlawful ; it might be going too far, to say all trading with enemies is unlawful, for that general doctrine would go a great way, even when English goods only are exported, and none of the enemies' imported, which might be very beneficial."

The insurance, in this case, was on a British ship sailing under a neutral flag, and with false neutral papers, and trading to an enemy's port. It was, therefore, a plain case of a trading with the enemy by British subjects; nor can it be doubted that the vessel was liable, on that ground, to be condemned in the admiralty; yet Lord Hardwicke seems to have held that the insurance was valid, although he refused to amend an alleged mistake in the policy, which was a bar to the recovery of the assured. In his opinion, in the case of *Griswold v. Waddington*, Chancellor Kent says, that the observations of Lord Hardwicke, which "have been thought favorable to some partial and undefined intercourse between the subjects of hostile states," were "loose, and almost unmeaning." (16 *Johns.* 463.)

Planché v. Fletcher, (1 *Doug.* 251.) The insurance was on goods on board a neutral ship on a voyage from London to Nantz. The policy was effected before hostilities had broken out between England and France; but the vessel did not sail until a proclamation for reprisals had been issued, that is, until war had been declared. Whether, therefore, the goods were the property of the British shipper, or of the French consignees, their exportation was plainly illegal, and the insurance void; upon the first supposition as on a trading with the enemy, and on the second, as covering enemies' property. The ship had been captured, and the goods condemned in the admiralty, as enemies' property, and it was for the recovery of this loss that the suit was brought. On the argument of a motion for a new trial, it was distinctly stated, as a conclusive objection to the plaintiff's recovery, that, in time of war, the exportation of enemies' property, even in neutral bottoms, was illegal, and that the insurance was, therefore, void; but in reply to the objection, Lord Mansfield is reported to have said, "It does not appear that the goods were French property; an Englishman might be sending his goods to France in a neutral ship," (plainly implying that such a trade was lawful,) "but it is indifferent whether they were English or French. The risk extends to all captures." That is, it was immaterial whether the goods were, or were not, enemies' property, since the general words of the policy embraced the risk, even of British capture. The motion for a

new trial was refused, and judgment given in favor of the assured. If this case is correctly reported, I see no escape from the conclusion that it was a positive decision, that enemies' property may be lawfully insured. It was a direct sanction given by a court of common law to a trade, which the court of admiralty had declared illegal, and had visited with the penalty of confiscation.

Thellusson v. Fergusson, (*Doug.* 361.) The insurance was on a French ship, on a voyage from Guadaloupe to Havre. The contract was made during a war with France. The ship sailed during the war, was captured on her voyage by a British frigate, and condemned as prize of war by the British admiralty, and yet the plaintiff was permitted to recover. The counsel for the defendant made no objection to the legality of the contract, and the question was not alluded to by the court.

In the case of *Bermon v. Woodbridge*, (*Doug.* 780,) the circumstances were exactly similar. The ship, a French ship, was enemies' property when the insurance was made, and during the voyage, and was taken and condemned as such, and the objection of illegality was neither raised by the counsel, nor adverted to by the court. To these are to be added the cases of *Eden v. Parkinson*, (*Doug.* 732,) *Plantamour v. Staples*, (1 *Term*, 611, note,) and *Tyson v. Gurney*, (3 *Term*, 477;) in all of which, the loss claimed arose from the British capture and condemnation of the property insured, as enemies' property; yet, in neither was the objection of illegality raised by the counsel, or considered by the court. Cases so numerous must certainly be regarded as conclusive evidence of the general understanding of the profession, that the objection could not have been urged with success.

Gist v. Mason, (1 *Term*, 84.) The suit was brought by an underwriter, to recover the premiums on several policies of insurance. The defendants were British merchants, residing in the West Indies, and the insurances were made on sundry cargoes of provisions, shipped by them, in neutral vessels, from Ireland to an enemy's colony. The defence was, that these voyages were illegal, and that, as the parties were *in pari delicto*, the plaintiff could not be entitled to recover; no evidence, however, to show the illegality of

the trade, was given on the trial, and Lord Mansfield being of opinion, that the policies were valid on their face, the jury, under his direction, found a verdict for the plaintiff. The defendants moved to set aside the verdict, in order that they might be admitted to prove, on a second trial, that the trade was certainly and notoriously illegal ; but the Court of King's Bench denied the motion.

In giving his opinion, Lord Mansfield said—" This, upon the face of it, is the case of a neutral vessel. It is no where laid down, that policies upon neutral property, though bound to an enemy's port, are void. By the maritime law, trading with an enemy is cause of confiscation, in a subject, provided he is taken in the act ; *but this does not extend to a neutral vessel.*" It was not, however, for these reasons, as appears from the opinion of the other judges, (Ashhurst and Buller,) that a new trial was refused ; but solely on the ground, that the defendants, having omitted to give the necessary proof on the first trial, had no claim to be relieved against their own negligence.

The language of Lord Mansfield in this case, in speaking of the vessel as neutral, without adverting to the fact, that the cargo the subject insured, was British property, engaged in a trade with the enemy, is very remarkable. No person, Sir William Scott observes, (*The Hoop*, 1 Rob. 217,) was more perfectly apprised that the neutral bottom gives, in no case, any sort of protection to a cargo that is otherwise liable to confiscation ; and he, therefore, concludes that " the words of this great judge were, in some degree, misapprehended by the reporter." Precisely the same doctrine, however, that these words imply, seems to have been laid down in *Planché v. Fletcher*.

Brandon v. Nesbitt, (6 Term, 23.) The insurance was on goods, and the defendants pleaded, that the persons interested in the goods were alien enemies, and at the time the ship sailed on the voyage insured, resided in France, between which country and England a war then existed. It was upon the sufficiency of this plea, that the discussion before the court chiefly turned, and judgment was given for the defendant, on the sole ground, that an action will not lie, by, or in favor of, an alien enemy. This case, therefore, decided nothing as to the legality of the contract, for Lord Kenyon

intimated, that the same rule would apply to an action by an enemy on a ransom bill, (which is admitted to be a valid contract,) unless when the suit is brought after peace is restored.

In *Bristow v. Towers*, (6 Term, 35,) which was argued and decided at the same term as *Brandon v. Nesbitt*, the circumstances were nearly similar, except, that the parties interested in the goods, were alien enemies, when the policy was effected, as well as, at the inception of the voyage, and the fact that they were so, instead of being pleaded specially, appeared in evidence on the trial. In this case, the general question, whether an insurance on enemies' goods is lawful, was largely and ably argued by the counsel; but the court still avoided its decision, and in giving judgment for the defendant, satisfied themselves with saying, that the case was not distinguishable from *Brandon v. Nesbitt*; which was merely deciding that the defence of alien enemy, is just as available under the general issue as when specially pleaded. We shall see, hereafter, that this rule has since been modified.

Bell v. Gilson, (1 Bos. & Pull. 345.) The goods insured, in this case, were shipped in a neutral vessel, and had been purchased in Holland on account of the assured, who were British merchants, resident in England, after the commencement of hostilities between Holland and Great Britain, and the court, declaring that they did not mean to decide the general question, whether a British subject may carry on trade in an enemy's country in time of war, yet held, that the trade, and consequently the insurance, under the special circumstances of the case, was lawful. It is unnecessary to make any remarks on this decision, as we shall see, that, in the case next to be cited, and which arose on the same policy, a contrary, and the true doctrine was finally established.

In giving his opinion in this case, Mr. Justice Buller made the following important disclosure, relative to the views of Lord Mansfield, which is necessary to be transcribed, as justifying the statement in the text—"In later times, I well remember to have seen many policies tried, professedly, on enemies' property, without ever hearing the objection raised. Lord Mansfield did all in his power to

prevent so dishonorable a defence being made. When the case of *Gist v. Mason* came on, I more than once conversed with Lord Mansfield on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said, that in former times it was considered for the interest of the country to insure enemies' property, and on the persuasion of its being for the interest of the country, he always discountenanced any objection on that head. But he never went beyond the ground of expedience."^(a)!

Potts v. Bell, (8 Term, 548.) The facts in this case, were the same as in *Bell v. Gilson*, for although the parties were different, the suit, as already stated, was founded on the same policy. The action was commenced in the common pleas, where, upon a special verdict, judgment was given for Bell, the plaintiff below, and the cause was then carried by a writ of error, to the King's Bench. The case was twice argued, and the second time, at the request of the court by civilians. On this occasion, Sir John Nicholl, the king's advocate, appeared for the plaintiff in error, and delivered a most able and learned argument, by which the judgment of the court was evidently controlled. He commenced this argument with a brief and luminous statement of the general rules, applicable to the subject, and as his views were sanctioned and adopted by the court, I shall transcribe this statement, as exhibiting, in a condensed form, the actual state of the law. "A subject of this country cannot trade with the enemy, without the king's license, and under the circumstances stated in the special verdict, if these goods had been taken at sea, by any of our cruisers, and brought into the

(a) Mr. J. Buller added: "At present I think such insurances are not expedient, the state of the countries at war, is such as to make them otherwise." On these expressions, which seem to imply that a judge has the right to declare and vary the law, according to his own personal and shifting notions of expediency, Mr. Marshall has made some very just and forcible remarks. The language was doubtless inconsiderate, and such as the learned judge would not, upon reflection, have attempted to justify. A doctrine that, in effect, makes the mere will of the judge, the rule of decision, is not law, but, in its essence, the subversion of law. (*Marsh.* 34, 35.)

court of prize, they must, necessarily, have been condemned as prize. This rule has been long settled, and is so undeniable, that it is unnecessary to enter into the principles on which it is founded, which must now be presumed to be politic, wise and just. Nor will it be necessary to enter into argument to show that there can be no distinction between policies of insurance, and other contracts in this respect; for if trading with an enemy be illegal generally, it must be in this particular instance, and every contract of indemnity against the risks attendant on such trading, must also be illegal. There is no distinction between policies of insurance made to protect an adventure against the common law, and those *against the law of the admiralty*, which equally forms a branch of the *general jurisprudence of the kingdom*. War puts every individual of the respective governments, as well as the governments themselves, into a state of hostility with each other. There is no such thing as a war for arms, and a peace for commerce." The learned advocate supported these views by the citation of numerous decisions in the admiralty: but these it is now unnecessary to notice, as in treating specially of a trading with the enemy, I shall hereafter, have occasion to refer to them.

At a subsequent term, Lord Kenyon, in giving the judgment of the Court, remarked, that, "the reasons which the king's advocate had urged, and the authorities he had cited, were so many, so uniform, and so conclusive, to show a British subject's trading with the enemy was illegal, that the question might be considered as finally at rest, and that it might be now taken for granted, that it was a principle of the common law, that trading with the enemy without the king's license, was illegal in British subjects, and that the consequence was, that the judgment of the Court of Common Pleas must be reversed." It is to be observed that the loss, in this case, arose from a capture by the French. The court, therefore, in reversing the judgment of the Common Pleas, necessarily determined that the insurance was wholly void, and not merely void as against a British seizure. They rightly considered the entire invalidity of the contract to be a necessary consequence of the illegality of the trade.

Although an insurance upon enemies' property really stands, upon the same ground, as an insurance to protect a

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ading with the enemy, yet it was some years after the decision in *Potts v. Bell*, before the entire invalidity of the contract, in the first case, was formally and explicitly determined.

In *Nantes v. Thompson*, (2 *East*, 385,) the declaration averred that the ship on which the insurance was made, was a foreign ship, and that the loss arose from her condemnation as lawful prize in the High Court of Admiralty, yet no objection was made, on this ground, to the plaintiff's recovery. The declaration, however, contained no averment of an interest in the ship, either in the plaintiff or in any one else, and it is, therefore, probable that the objection that was regarded as a wager policy, to which the objection that the insurance was for the benefit of an enemy, would not apply. The property might belong to an enemy, but it did not appear that an enemy would be indemnified for the loss.

Furtado v. Rodgers, (3 *Bos. & Pull.* 191.) The insurance was on a French ship, and was made in time of peace; but, before the termination of the risk, war broke out between England and France, and the ship was seized, and condemned as enemies' property by the British government. For the recovery of this loss the suit was brought; but it was not commenced until after the restoration of peace. The objection, therefore, of the personal disability of the parties interested as alien enemies could not be taken, and the court was compelled to meet and decide the general question, whether the contract was valid as against British capture. The case was learnedly and ably argued, and Lord Alvanley, Ch. J., who delivered the judgment of the court, in favor of the defendant, in a very elaborate opinion, discussed the legality of insurances upon enemies' property, both upon principle and upon the authorities. He admitted, and took pains to show, that there had been no direct determination of the question, no express decision of the courts for or against the legality of the contract, and that it was then, for the first time, to be decided, and stated, in conclusion, as the ground of the decision of the court, that, "when a British subject insures against capture, the law infers that the contract contains an exception of captures made by the government of his own country, and that the plaintiff, in the case before them, was not even entitled to a return of

premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses, *but those arising from capture by the forces of Great Britain.*" From these expressions Mr. Marshall^(a) infers that his lordship meant to declare his opinion that an insurance upon enemies' property is, in all cases, valid against all losses, but those proceeding from British capture. But the language of his lordship must be understood in reference to the particular case, in which, the contract being made in time of peace, was lawful in its origin. Upon an attentive examination of his opinion, it is quite evident that he meant to declare, as the judgment of the court, that, when an insurance upon enemies' property is made *during a war*, the contract is wholly void. He refers, with marked approbation, to the arguments of Bynkershoek and Valin, and, subsequently, says, "We are all of opinion, that to insure enemies' property was, at common law, illegal for the reasons given by the two foreign jurists, to whom I have referred;" and these reasons, we have seen, reach to and demonstrate the entire invalidity of the contract. The only question that the opinion of Lord Alvanley leaves in doubt, is, whether the effect of hostilities, converting the assured into an enemy, upon an antecedent policy, is to exonerate the insurers from all its risks, or merely from that of British capture; and this doubt, we shall see, has since been resolved.

Kellner v. Le Mesurier, (4 East, 396.) In this case the ship insured was stated, in the declaration, to be a foreign ship, and the loss was averred to have arisen from her being taken as prize by the British government. To this declaration, the defendant demurred, and, as it did not appear from the pleading, that the assured was an alien enemy when the contract was made, the single question, upon the merits, presented for the determination of the court, was, whether the underwriter was responsible for a loss resulting from British capture. Upon this question, Lord Ellenborough, in delivering the judgment of the court said, that, upon full consideration of the subject, the court were all of opinion

(a) Marshall, 43, note.

that the objection, taken by the defendant, was well founded, and that no action could be maintained upon the policy to recover the loss in question. That an insurance against British capture, *eo nomine*, would be illegal and void upon its face, as being directly and obviously repugnant to the interests of the state; and if such an insurance, made in terms by a British subject, would be void, an insurance, indirectly producing the same effect, by the application of the general terms of the policy to the particular event of British capture, must, upon principle, be equally illegal, and that no peril can be covered under the generality of the terms "capture, detention," or the like, that could not, consistently with law, be specifically insured against in express and direct terms."

Gamba v. Le Mesurier, (4 East, 407.) The circumstances, in this case, were substantially the same as in *Furtado v. Rodgers*. The insurance was made in a time of peace, upon a ship and goods belonging to French subjects. Hostilities afterwards commenced between England and France, during which, the loss claimed arose from British capture, and the suit was not brought until the restoration of peace. The court gave judgment for the defendants, upon the reasons they had before given in the case of *Kellner v. Le Mesurier*.

Neither the judgment nor the reasoning of the court, in the two last cases, it must be admitted, went further than to exempt the underwriter from a loss resulting from British capture. The question as to the effect of a subsequent war upon the general risks of an antecedent policy, was left undetermined; and this, in the case next to be cited, was finally decided.

Brandon v. Curling, (4 East, 410.) The insurance was on goods on board a neutral ship, from London to Bayonne, and the loss was stated to have arisen from seizure and detention.

It appeared in evidence, that the policy was effected previous to the war between Great Britain and France, on account of French merchants residing at Bayonne, to whom the goods were consigned. The ship sailed from London the day before the declaration of hostilities against France, but did not leave Gravesend, where she stopped for her papers, until two days thereafter. In the course of her

voyage, she put, from necessity, into a port of Spain, where the goods were seized by Spanish officers, and afterwards condemned as prize. There was no evidence that Spain was an ally of Great Britain at the time of the seizure. Upon the argument, the counsel for the plaintiff stated that the question to be resolved, as arising from the facts in evidence, was this: Whether the contract being lawful when made, and the suit brought in time of peace, the insurers were liable for any losses happening from a peril of the sea, or from any other cause than a hostile act of their own government, or of the government of an ally. And Lord Ellenborough, in giving the judgment of the court for the defendant, virtually admitted that this was a true statement of the question to be determined. He observed in substance, that the principle by which the court had been governed in *Kellner v. Le Mesurier*, was applicable to the case under judgment, namely, that it was contrary to the interest and policy of the state to permit a recovery to be had for any loss happening, under an insurance, during a war between the countries, to which the parties belonged. Consequently, that a policy made in time of peace, upon goods generally, is to be considered as having ingrafted in it a proviso to this effect—"Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities, between the respective countries of the assured and assurer." Because, he added, during the existence of such hostilities, the subjects of the one country cannot allowedly lend their assistance, to protect by insurance, the property and commerce of the subjects of the other. Thus, it was finally determined, that a supervening war between the countries of the assurers and the assured, from the time that it occurs, renders a prior insurance illegal and void, precisely for the same reasons that render the contract illegal in its origin, when made during a war. A war, if it does not extinguish, suspends the life of the contract, and whether its life would be restored by the cessation of hostilities, before the termination of the risks, is a question that has not yet arisen, and the contingency is so remote and improbable, that it is unnecessary to be considered. A war, that should commence and terminate during the continuance of the

risks of a policy, would be a novelty in the history of the world.

Two or three cases, affecting only incidental points, remain to be noticed.

We have seen, that it was stated by Lord Ellenborough, in *Kellner v. Le Mesurier*, that "an insurance against British capture, *eo nomine*, would be illegal and void on its face." In the case of *Lubbock v. Potts*, (7 East, 449,) the policy on a British ship and cargo, contained a clause by which the underwriter agreed to insure the property "against all risks whatsoever, *British capture, seizure and detention included*," and the counsel for the defendant referring to the language of Lord Ellenborough, in *Kellner v. Le Mesurier*, insisted that this clause vitiated the policy. But the court observed in reply, that what was said in the case relied on, must be taken in reference to the subject matter; that being the case of a policy on a foreign ship, the general words of which, were considered as not extending to insure the property against British capture in *case of hostilities*; and they were inclined to think, that construing the words of the clause in a favorable sense, as extending only to cover losses happening from *unlawful* capture, seizure, and detention by British ships, or even extending them to a temporary *lawful* detention, without any fault of the assured, the agreement would not vitiate the policy. The point was, however, passed over, and the case decided against the plaintiff, upon other grounds.

It seems to have been supposed, that this case establishes an important distinction between the effect of an insurance against British capture and detention, when the ship or goods are British, and a similar insurance upon a foreign ship or cargo. That, while in the first case, the agreement may receive a favorable interpretation, in the latter it necessarily avoids the policy; (a) but it must be evident upon reflection, that there can be no ground for such a distinction. An insurance made in England, against a lawful seizure or detention by the English government, must be equally in-

(a) 1 Park, (Hild. ed.) p. 530. Marsh. 43.

valid, whether the property insured be British or foreign. In neither case can the policy be extended to cover the risks of an illegal voyage or act; but no reason can be given, why a general insurance against British capture and detention, *is nominibus*, may not be innocently construed in the case of a foreign, as well as of a British ship; for the legality of such an insurance, if limited to an *unlawful* seizure or detention, or to a temporary lawful detention, without any fault of the assured, is just as certain in the one case as in the other. (a) Should a policy, made in time of peace, upon a foreign ship, contain an agreement, that, in the event of a war between the respective countries of the assurer and the assured, the risks of British capture, &c. should be included, the contract would be clearly void, for the illegal intent would be manifest on its face; but, should the policy, without any reference to a future war, insure immediately, and in terms, against the same risks, there would be no reason to suppose that the event of a war, converting the property insured into that of an enemy, and thereby rendering the contract illegal, was in the contemplation of the parties, nor, consequently, that they meant, that the words of the policy should be applied to that event. The presumption, that the parties meant only to insure against lawful risks, would be quite as fair, and reasonable, as if the property insured belonged to British subjects. The reasons for restricting their language to such risks, would have the same force; nor is it possible to believe that a British court of justice would apply to the respective cases a different rule. The distinction would be unreasonable, and therefore impolitic and odious. In truth the language of the court in *Lubbock v. Potts*, gives no countenance to such a distinction. They plainly intended to say no more than that the insurance is void, when on its face it is designed to protect the property, as that of an *enemy*, from British capture.

In the case of *Glaser v. Cowie*, (1 M. & S. 55.) Lord Ellenborough places a further limitation upon his general language in *Kellner v. Le Mesurier*. He there states, that if a policy upon foreign property should embrace the risk of

(a) *Barker v. Blakes*, (9 East, 283.) Post, Lec. V. Note. IV.

British capture, even the intention of the parties, to cover an unlawful risk, would not make the whole policy illegal and void, though, perhaps, he adds, the insurance would be void *pro tanto*. I add, that where the insurance is, and continues to be, upon neutral property, and the voyage is not illegal, there seems to be, no reason why the insertion of the risk of British capture should affect the general validity of the contract, and, that when the property is that of an enemy, either at the time of the contract or of the loss, the insertion of the risk is unimportant, since the contract is invalid in itself, and the insurer, of necessity, discharged. The decision in *Glaser v. Cowie*, therefore, seems to prove that the insertion of the risk is, in all cases, immaterial. It never binds the insurer to the payment of a loss, for which he would not be liable under the general words of the policy, and never vitiates a policy otherwise valid. If confined to lawful risks, it is mere surplusage. If extended to unlawful, it is simply void.

Flindt v. Waters, (15 East, 257.) I refer to this case as establishing an important exception from the general rule, that seems deducible from the decision, in *Bristow v. Towers*, that, where the party, on whose account an insurance is effected, is an alien enemy, the fact may be given in evidence as a valid defence under the general issue. It was determined in this case, that where the insurance is made, and the loss happens in time of peace, and the suit is brought in the name of the British agent effecting the policy, the fact, that the person, on whose account the insurance was made, was an alien enemy when the suit was commenced, must be pleaded specially, and cannot be admitted as a defence under the general issue. The ground of the decision was, that as the contract was lawful in itself when made, and when the loss happened, the party interested had acquired under it a vested right to an indemnity; that his disability to maintain an action for the recovery of the debt, was merely personal and temporary, and that, to permit it to be given in evidence under the general issue, would be to give to a defence, *temporary in its nature*, the unjust operation of a perpetual bar. It follows, from this decision, that, in an action upon a policy, the defence that the party interested is an alien enemy, must always be pleaded specially, unless it

goes to the very substance of the contract, and destroys forever the title of the assured to recover for a loss. Where it merely suspends the right of action, it must be pleaded. Vide also *Harman v. Kingston*, (3 Camp. 152.)

It would be unjust to conclude this note, without referring to the case of *Griswold v. Waddington*, (15 Johns. 57; S. C. in Error, 16 Johns. 438,) as containing, in the arguments of the counsel, and in the opinions of the judges, a more elaborate and thorough investigation into the consequences of a war, as affecting the relations, intercourse, and contracts of the respective subjects of the hostile states, than is elsewhere to be found. I refer especially to the arguments of Messrs. Wells and Emmet,^(a) in the Supreme Court, and to the opinion of Chancellor Kent, in the Court of Errors, (16 Johns. 443.) The latter is a most learned and elaborate dissertation "*omnibus absoluta numeris*" on

(a) Were this the place, the author would willingly dwell on the extraordinary merits of the two greatest advocates that have yet adorned the bar of his native state. The first, unrivalled as a logician, surpassing all in the purity and vigor of his style—in the order, disposition, and choice of his topics—in the soundness of his judgment, and the comprehensiveness of his views—and gifted with a natural dignity, that gave almost a judicial authority to every sentence that he uttered. The other, a copious and vehement orator, fertile in argument, rich in illustration, rising occasionally to the very heights of passionate and figurative eloquence; and if not always satisfying the judgment, invariably commanding the applause, and carrying with him the sympathies of his audience. During their lives, public opinion was greatly divided on the question, to which the palm of superiority was justly to be assigned; but, "*Illud quidem certè omnes ita judicabant, neminem esse, qui horum alterutro patrono, cujusquam ingenium requireret.*"

The fame of an American lawyer, whatever may be his learning, abilities, or eloquence, from the division of the nation into so many distinct communities, is, of necessity, in a great measure, provincial; and probably many an American, and certainly the English reader, will smile at this tribute to the memory of men, whose names had never reached his ears; yet, had Westminster Hall been the theatre of their forensic efforts, there is no hazard in the assertion, that both would have been placed, by the suffrage of the British nation, at least in the same rank with Scarlett, and Brougham, and Lyndhurst, and Follett.

His saltem accumulem donis,

The graves of men whom I loved and revered when living.

this branch of national and municipal law. It embraces a masterly and critical analysis of all the cases, and supports every position by an irresistible force of argument, as well as of authority. Like the treatise of Bynkershoek, it is not to be transiently consulted ; but, by a diligent and repeated perusal, should be transfused into the mind of the student.

It was determined by the Supreme Court in this case, and their decision was affirmed by the Court of Errors, that the war between Great Britain and the United States dissolved, *ipso facto*, a subsisting partnership between an American citizen, residing in New-York, and a British subject, residing in London. The propriety of the decision, as applied to a commercial partnership, that, from its nature, supposes and requires a frequent intercourse and communication between the parties, cannot be disputed ; but there are, doubtless, many contracts, of which a war suspends the existence, without dissolving the obligation. The distinction is probably this : A vested right, under a subsisting contract, is not affected by a subsequent war ; but where the contract is executory, and would have been illegal, if made in time of war, it becomes so from the time that hostilities commence, as to all acts to be performed by either party during the war.

NOTE III.

P. 423, § 16. It was decided by the Supreme Court of New-York, in the cases of *Ludlow v. Bowne*, (1 *Johns.* 1,) and of *De Wolf v. N. Y. Firem. Ins. Co.*, (20 *Johns.* 214,) and their decision in the second case, was affirmed by the Court of Errors, (2 *Cowen*, 56,) that the rule laid down by Sir William Scott, that goods shipped from a neutral country, to be delivered on their arrival to an enemy purchaser, under an agreement by which the risks of the voyage are assumed by the shipper, are to be regarded *in transitu* as enemies' property, and, therefore, lawful prize, ought not to be considered as sanctioned by the law of nations ; but is to be regarded as an unjust and arbitrary interpolation, "the offspring of mere state policy—the result of power, forgetting right." (C. J. Spencer, 20 *Johns.* 228.) I observe, upon

these decisions, that from the nature of the question, they profess to determine, they cannot be regarded as conclusive evidence of the existing law, even in the state in which they were pronounced. They are entitled to respect, but are not binding as authorities. Although the state courts are bound by the rules of the law of nations, in all cases to which they apply, they are not bound by them as a component part of their own municipal law. The law of nations as such, is not a part of the municipal law of each state; but an integral portion of the general national law of the United States, as much so as if all its provisions were incorporated, and declared to be law, in an act of Congress. It is certain that no state legislature has any right by statute, to change these provisions, and what cannot be done by legislative enactments, is certainly not to be effected by judicial decisions. It is only in their federative capacity, that the United States are a nation, and hence, the law of nations, is binding on the respective states, not as independent sovereignties, but as subordinate members of one body, and upon individuals, not as inhabitants of a particular state, but as citizens of the United States. The question, whether property on the ocean belongs to a neutral or an enemy, in all cases where the rights of a belligerent are concerned, is to be determined solely by the law of nations. It is a question of lawful prize or not, and the decision of all such questions, when directly presented for adjudication, by the constitution of the United States, belongs exclusively to the federal courts. The same questions may arise incidentally in a state court, but on all such occasions it will not be doubted that the state tribunals are bound to follow and obey the law as established, or declared, in the courts of the Union. It would be inconsistent with the very nature of civil society, that there should be two opposite systems of law, conflicting rules of action, prevailing at the same time, in the same community, and binding upon the same individuals; yet this dangerous conflict, in the progress of time, would certainly ensue from any other doctrine than that which has been stated.

These observations have been made as introductory to the remark, that the decisions in New-York are scarcely to be reconciled with the principles by which the courts of the

United States—I refer to the Supreme Court, as well as to the decisions of Mr. J. Story in his own circuit—have invariably been governed in the determination of prize causes. It is true, that, in these courts, the exact question, whether goods that are not to be paid for by an enemy purchaser until their arrival, are to be deemed his property, *in transitu*, has not been decided ; but the decisions in analogous cases, resting substantially on the same grounds, have corresponded, entirely, with those of the English admiralty, and have sustained, in their full extent, those doctrines of Sir William Scott, which the courts in New-York have chosen to reprobate, as infringing the rights of neutrals, and violating the law of nations.

It was laid down by the Chief Justice, in *De Wolf, v. The F. Ins. Co.*, that the only restrictions which the law of nations, justly interpreted, imposes upon the commerce of neutrals with a belligerent power, are the interdiction of trade in articles contraband of war, and the denial of entry into a blockaded port, and that, with these exceptions, every contract between a neutral and an enemy, is lawful and valid, that would be so by the law of the country where it is made, in a time of peace ; and it is evident, that these positions were the basis, not only of the judgment of the Supreme Court, but of its affirmance in the Court of Errors. Yet these positions, admitted to be law, would put an end to the whole doctrine of constructive ownership, of hostile character, resulting from the nature of the traffic, and of the invalidity, in special cases, of a sale or transfer from an enemy to a neutral. If these positions are true, a ship, in fact, neutral, but trading under the flag and pass of the enemy, or employed as a transport in the enemy's service, ought not to be condemned ; nor the produce of a plantation belonging to a neutral, in an enemy's colony ; nor the share of a neutral partner, in the property of a house of trade, in an enemy's country ; nor the ship or goods of a neutral, incorporated in the national commerce of an enemy ; and the legality of every transfer for a valuable consideration from an enemy to a neutral, of goods, *in transitu*, as it is certainly valid in time of peace, should be admitted and sustained. Indeed, the counsel for the assured, in the Court of Errors, considered the decisions of Sir William Scott, in all these cases, as flow-

ing from the same principle, and, therefore, included them all in one sweeping condemnation ; yet, in all of them, the doctrines of that eminent judge have been admitted, adopted, or affirmed by the Supreme Court of the United States.

The judgment of the Supreme Court of New-York, in *Ludlow v. Bowne*, was, in one respect, still more directly at variance with the decisions of the prize courts in the United States, as well as in England, than the decision in *De Wolf v. N. Y. F. Ins. Co.* In *Ludlow v. Bowne*, the legal title to the goods, by the very terms of the bill of lading, was vested in the enemy consignee, as whose property, they were condemned ; yet, in order to show that the property was, in fact, neutral, and the condemnation, therefore, unjust, the court admitted, in evidence, a private contract between the parties, contrary to the established rule, that, in a court of prize, the legal title is the true and only test of actual ownership. It was upon this ground, as well as for other reasons, that the Chief Justice (Kent) dissented from the opinion of the majority of the court.

Considering the question, merely on the ground of authority, and laying out of view the actual decisions of the federal courts, it will probably be thought by many readers, that the New-York decisions are, at least, counterbalanced by the expressed opinions of Mr. Justice Story, and of Chancellor Kent ; each of whom, in terms the most unequivocal, has declared his adherence to the reprobated doctrines of Sir William Scott.

In the *Ann Green*, (1 *Gallis*, 291,) Mr. Justice Story says—"The cases are, I think, settled upon just principles, that decide, that, in time of war, property shall not be permitted to change character in its transit, *nor shall property consigned, to, become the property of an enemy, upon arrival, be protected by the neutrality of the shipper.* Such contracts, however valid in time of peace, are considered, if made in war, or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean." In a note, the learned judge refers to the very cases from which the doctrine, as stated in the text, has been deduced ; and in a subsequent case—the *Francis*, (1 *Gallis*, 450,)—he

has repeated the expression of these views, in language equally strong and explicit.

Chancellor Kent, in his Commentaries, (retaining the opinions that he had expressed as Chief Justice, in *Ludlow v. Bowne*,) after stating the rule, that the hostile character of property on the ocean cannot be changed by a transfer, *in transitu*, proceeds to say: "So, property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken, *in transitu*, as enemies' property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy. The prize courts will not allow a neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master, are considered as delivered to the consignee. All such agreements are held to be constructively fraudulent, and if they could operate, they would go to cover all belligerent property, while passing between a belligerent and a neutral country; since the risk of capture would be laid *alternately on the consignor or consignee*, as the neutral factor should happen to stand in one or other of these relations." He then adds: "These principles of the English admiralty have been explicitly recognized and acted upon by the prize courts of this country." Thus ratifying that construction of the United States' decisions that I have adopted. In a note, he refers to the cases of the *Anna Catharina*, and the *Sally*, *Griffith*, which are among those quoted in the text; but he gives no reference to the cases of *Ludlow v. Bowne*, and *De Wolf v. N. Y. F. Ins. Co.*, nor does he allude to them in his text. The omission, as we cannot doubt his perfect knowledge of these cases, is most significant. It is equivalent to an express rejection of their authority. 1 *Kent's Commen.*, (5th ed.) p. 86, 87.

The opinions thus given of these eminent jurists are conclusive to show, that in their judgment, the doctrine of Sir William Scott, that has been adopted in the text, so far from meriting the reproach and censure with which it has been visited, is a just exposition of the law of nations, and that the reasons by which it is sustained, are not merely probable, but in truth unanswerable, since the adoption of an opposite rule, by its necessary effect, would exempt all

belligerent property on the ocean from the risk of capture, and the penalty of confiscation. It has been the settled policy of the government of the United States, to change as far as practicable the existing law of nations, by introducing into all its treaties with foreign powers, the liberal maxim, that "free ships shall make free goods," and the wisdom of this policy, the writer is not at all disposed to question. On the contrary, his opinions and wishes, go still further in the same direction. Could his wishes effect the change, private war and the seizure of private property on the ocean, would be abrogated at once and forever. But while, by the law of nations, the right of capture exists, and is admitted to exist, we are surely not permitted to subvert or evade the rules, by which alone its effectual exercise can be secured, since, to deny the obligation of such rules, is virtually to deny the existence of the right. I add a single remark that, properly weighed, I think, must be regarded as conclusive. It has been stated, that the rule we are considering, was first adopted and enforced by the English prize courts, in the year 1795, (*Hoffman Arguendo*, 2 Cowen, 81,) but upon referring to the case of the Sally, Griffiths, (3 Rob. 302,) which was decided by the Lords of Appeal in that year, we find that this language was held by the court :—"It has always been the rule of the prize courts, that property going to be delivered in the enemies' country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property," and the counsel for the captors, in the same case, referred to the standing interrogatories of the court, which were settled and adopted in the year 1741, as conclusively proving that the rule in question, was a known and established principle of the court. I know of no reason, that gives us a liberty to doubt the truth of these statements, and it, therefore, follows that the doctrine which has been censured as a modern and arbitrary innovation, was a component part of the prize law of the British empire, *when the United States declared their independence*. The legal consequence I state in the language of Chief Justice Marshall—"The United States having, at one time, formed a component part of the British empire, *their* prize law, was our prize law ; when we separated, it continued to be our prize law, so far as it was adapted

to our circumstances, and was not varied by the power which was capable of changing it."^(a) Congress is the only power capable of changing an established rule of the law of prize—and as the rule in question, had not been thus changed, it was just as binding upon the courts in New-York, when they pronounced their decision, as any known and established rule of the common law.

NOTE IV.

P. 434, § 31. It is stated by Mr. Wheaton, in his valuable treatise on the Law of Maritime Captures—a work, to which I freely confess my obligations—that where the right of stoppage *in transitu*, has been duly exercised, the consignee, by the municipal law, has a right to change the consignment, and that "the law of war permits the delivery to be made to another neutral consignee by order of the enemy shipper." This last position is certainly erroneous. It is not sustained, either by the facts, or by any expressions in the opinion of the court, in the case to which Mr. Wheaton refers, (*The Constantia*), and by the decision in the *Tweede Venner*, which proceeded directly on the opposite ground, it is contradicted and overruled. This is the only material error that I have discovered in this very accurate treatise, which I have, in a measure, adopted as a guide; nor should I have noticed its existence, had it occurred in a work of less authority. (*Wheat. on Cap.* p. 88.)

NOTE V.

P. 436, § 33. The words of Sir William Scott, in the case to which I refer, seem susceptible of no other construction than that which I have adopted in the text. They are as follows—"It is a settled principle in this court, that, in order to constitute an effectual transfer of the property, there

(a) 9 Cranch, 198.

must either be an order for the goods, or an *effectual acceptance of them*, by the consignee, prior to the capture. If the capture takes place where no order has been given, and before the *goods have been accepted*, they must be considered as the property of the person who so consigned them. In this case, the court has called for evidence to show whether any order had been given by the British merchants, or any act done by them in the nature of an acceptance, before the capture," (1 *Ed.* 347.) The proof required was not given; but it is a necessary inference, as well from these words as from other parts of the opinion, that, had any act of the British merchants, in the nature of an acceptance, prior to the capture been proved, imposing on them a legal obligation to receive the goods, they would have been restored.

In the case of the *Francis*, (*Dunham & Randolph's Claim*), 9 *Cranch*, 185, the counsel for the claimants relied on the distinction we are considering, and insisted, that a few days prior to the capture, and while the goods were *in transitu*, the consignment had been accepted absolutely, by the claimants, on the terms required by the shippers; but the court were of opinion, that the acceptance was not absolute, but partial and conditional; and, therefore, could not operate to divest the legal title of the shippers; and they expressly declined to consider the question, whether the case, had the acceptance been absolute, could be excepted from the general rule, relative to change of property *in transitu*, adding, that the reasoning on which they founded their decision, was not to be considered as an implied admission of the soundness of the distinction, taken by the counsel for the claimants. I cannot help thinking, that this caution would not have been added, had the case of the *Cousine Marianne* been quoted, and the necessary import of the language of Sir William Scott had been duly weighed, as it, doubtless, would have been.

NOTE VI.

P. 437, § 36. The language of Sir William Scott, in concluding his judgment in the case of the *Herstelder*, shows,

still more plainly, his disapprobation of the rule on which he acted. "If I am right," he said, "in considering the property in this case in the same light as other Dutch property, it must follow the same course—(i. e. be condemned.) I am aware, that this is to act upon a principle sufficiently strong—but it is one that has been laid down by the Supreme Court, and therefore, it is one that I am undoubtedly bound to obey; although, I have no scruple to declare, that it is a principle which I am not disposed to carry a step further than authority leads me." (1 *Rob.* 118.) It is admitted by Sir William Scott, in the same case, that the general rule is, that, as personal property follows the rights of the person, if the owner at the time of seizure was entitled to restitution, and at the time of adjudication, is in a capacity to claim, the property must be restored. It is by virtue of this general rule, that property is always restored, which, although hostile at the inception of the voyage, by the intermediate conclusion of peace, had become that of a friend at the time of capture; and the cases of the *Dankebaar Africaan*, &c., certainly seem to be very arbitrary exceptions.

NOTE VII.

P. 440, § 41. In the *nisi prius* case of *Bromley v. Heselstine*, (1 *Camp.* 75,) the consignees and owners of the goods insured were aliens, residing at Leghorn, which, at the time the policy was effected, was in the possession of French troops. The vessel was, however, bound to a neutral port, where the goods were to be delivered. The counsel for the underwriters objected to a recovery of the loss, on the ground that the consignees, the assured, "were residing in a place, then in a state of declared hostility to England; and that, as the trading by them, under such circumstances, certainly tended to the aid and comfort of the enemy, it could not be legally covered by an insurance." And in reply to this objection, Lord Ellenborough is reported to have said: "I do not know, that, merely because an alien happens to be resident in an enemy's country, goods to be delivered to him at a neutral or friendly port, are, on that account, uninsurable. Suppose a British

merchant to be entrapped and confined in an enemy's country; it can scarcely be said, that all the trade he may still carry on, is in aid of the king's enemies, illegal, and incapable of being insured." The plaintiff had a verdict, and it does not appear that any attempt was made to disturb it.

The distinction which, in this case, Lord Ellenborough seems to intimate, between the effect of a policy upon the goods of an enemy, as destined to a neutral or a hostile port, rendering the insurance lawful in the one case, and illegal in the other, has certainly no foundation in reason or authority. It is, therefore, difficult to believe, that his lordship could have used the exact language that is imputed to him. The probable ground of his decision was, that the possession of Leghorn by the enemy was military and temporary, and, therefore, had not operated to change the national, neutral character of the assured, as subjects of the King of Tuscany. The very illustration that he gives of a British subject, detained by force in an enemy country, seems to confirm this view. He probably considered the assured as neutral subjects, not owing even a temporary allegiance to France, but detained by force at Leghorn. If the consignees of the goods, in this case, could rightly have been considered as merchants, voluntarily residing and trading in an enemy's country, their property on the ocean, to whatever port it was destined, was undoubtedly liable to British capture, as prize of war, and consequently, the insurance thereon was illegal and void. In a court of prize, where the question is, whether the goods libelled belong to an enemy, or neutral, their actual quality and destination are wholly immaterial. It is the national character of the owner that alone condemns or acquits them, and in most cases, his national character is determined by his residence.

In the case of *Bentzon v. Boyle*, in the Supreme Court of the United States, (9 *Cranch*, 191,) one of the questions on which the propriety of a condemnation depended, was, whether the Danish island of Santa Cruz, which had surrendered during the war, to a British force, could properly be considered as a British island, while in the possession of Great Britain. In delivering the judgment of the court, Chief Justice Marshall said that "on this question there

was no foundation for the doubt that had been raised. Although, acquisitions made during war are not considered as permanent, until confirmed by treaty; yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz after its capitulation, remained a British island, until it was restored to Denmark."

The distinction between this, and the other cases, is plainly that stated in the text. The surrender of the island was a conquest, by which the allegiance of its inhabitants was transferred to the conquering power. The conqueror held not a naked military occupation of the territory, but had seized and exercised all the powers of the civil government.

NOTE VIII.

P. 445, § 46. In the case of the *Maria*, (1 *Rob.* 340,) in which the important question arose, whether a neutral ship forfeits her neutrality by placing herself under the protection of an armed convoy, with a view to resist the belligerent right of visitation and search, Sir William Scott thus expresses himself:—"In forming my judgment, I trust it has not escaped my anxious recollection for one moment, what it is that the duty of my station, calls for from me; namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference, that justice which the law of nations holds out, without distinction to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question, exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which

he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question."

It has been too much the practice, in the United States, to represent the decisions of Sir William Scott, in prize causes, as dictated, in a great measure, by an exclusive regard to the interest and policy of Great Britain as a belligerent power, and, consequently, as involving a frequent violation of the rights of neutrals, as defined by the law of nations. This opinion I am forced to regard as an unjust and groundless prejudice, nor can I scruple to avow my serious conviction, that no tribunal has ever existed, in which justice has been administered more equally, impartially, and ably, than in the prize court over which this eminent person so long presided. There was, doubtless, a bias in his mind in favor of the captors—a bias created, almost of necessity, by his constant experience and detection of the frauds by which enemies' property, in time of war, is sought to be covered; but I have discovered no case in which this bias seems to have been the parent of actual injustice. It excited his suspicions, and quickened his vigilance; but never obscured his judgment, or perplexed his moral sense, in the investigation of facts; far less did it ever lead him to strain or pervert the principles of that universal law which he thoroughly understood, and was deeply conscious of his obligation to administer. In the case of *Griswold v. Waddington*, (16 *Johns.* 468,) Chancellor Kent, whose testimony I feel it a duty to add, made these remarks: "In 1798, Sir William Scott was appointed Judge of the High Court of Admiralty, and from the uncommon talent and learning, as well as purity and taste, so conspicuous in his decisions, that court excited a great share of public attention; and dealing chiefly with questions of universal concern, it spread the judicial character of the English throughout the civilized world. Judging from the decisions of the Supreme Court of the United States, I should say, that the authority of that eminent judge stood as high at Washington, as it does at Westminster; and there is scarcely a decision of his on the general principles of national law, but what has been adopted by the federal courts, even during the heat and tu-

mult of the late war." In the same case the chancellor thus closes his examination of the celebrated judgment in the case of the *Hoop*. "I can only add, upon the conclusion of that decision, that any court of justice, that can expound the law with such admirable perspicuity, and maintain it with such intrepid firmness, in spite of all personal feelings and of the hardships and compassion of the case, must impart honor to the country in which it is instituted, as well as command the confidence and esteem of the rest of mankind."

It is, doubtless, true, that many rules have been laid down by Sir William Scott, that are not explicitly stated by any writer on public or international law ; but these rules are not to be condemned as novel or arbitrary, if they are, in truth, a just or reasonable deduction from principles universally admitted. That such is their character, the learned judge, in stating them as the grounds of his decisions, invariably attempts to prove, and certainly we have no right to reject the rules, if we are unable to refute the reasoning on which they are founded.

It is a very just observation of Chief Justice Marshall, that the principles of the law of nations, which are liable to be differently understood by different nations, are, in some degree, fixed and rendered stable, by a series of judicial decisions, and hence, that the courts of the United States are bound to examine and consider those decisions in adopting the rules that ought to govern in particular cases, as they arise. (9 *Cranch*, 198.)

As a guide to judges on similar occasions, the series of decisions in the English admiralty, during the time of Sir Wm. Scott, which, in fact, are the decisions to which Chief Justice Marshall refers, have an enduring and surpassing value. They are an enlightened and vigorous application of the general principles of the law of nations, to the ever varying circumstances of real life ; and these principles, by their frequent and varied application, are more clearly defined and in all their bearings, and with all their reasonable exceptions, more completely understood.

NOTE IX.

P. 459, § 61. In the case of the *Commercen*, (1 *Wheat.* 382,) the Supreme Court of the United States gave their explicit approbation to the decisions of the English Admiralty in the *Atalanta*, the *Friendship*, and the other cases referred to in the text. In the *Commercen*, the principal question was, whether the conveyance of provisions in a neutral ship to a neutral port, but designed for the immediate use of the British armies in Portugal, was such an employment of the vessel in the enemies' service, as subjected her to condemnation. The ship was not condemned, but was denied her freight, and the denial was justified by a reference to the decisions of Sir William Scott, in analogous cases. In delivering the judgment of the court, Mr. Justice Story made these remarks :—"Was the voyage lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employ, are acts of hostility which subject the property to confiscation. And the carrying of despatches from the colony to the mother country of the enemy, has subjected the party to the like penalty. And in these cases, the fact that the voyage was to a neutral port, was not thought to change the character of the transaction. The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, and assist in warding off the pressure of the war, or in favoring its offensive projects. Now, we cannot distinguish these cases, in principle, from that before the court."



ILLEGAL INSURANCES.

ENEMY'S PROPERTY.

LECTURE V.

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§ 1. The condemnation of enemies' property, in most of the cases in which it is pronounced, is founded, neither on the nature of the traffic, the origin of the goods, or the employment of the ship; but solely on the national character of the owner, as a subject or citizen of a hostile country. It is not obvious, why an inquiry into this fact should be perplexed with any doubts or difficulties; yet, it is certain that it involves considerations, that, in many cases, require to be weighed with a peculiar care, and, for a time, may embarrass the mind, and suspend the decision, of the most experienced judge. The national character of a merchant is not necessa-

rily known, by ascertaining the country to which his allegiance is due, either from his birth, or his subsequent naturalization, or adoption ; it is determined solely by the place of his permanent residence. In the language of the law, it is fixed, by his domicil. He is a political member of the country into which, by his residence and business, he is incorporated—a subject of the government that protects him in his pursuits—that his industry contributes to support, and of whose national resources his own means are a constituent part. Nor is this merely a principle of the law of nations, a rule of decision in the courts of prize. It is equally admitted and followed, both in England and in the United States, in the courts of common law ; and it is applied in a belligerent country, as well to its own subjects, as to those of a neutral power.(a) Thus, an American citizen, who is settled abroad during a war, to which the United States are a party, is subject, in all their courts, to all the disabilities of an alien enemy, or entitled to all the privileges of a neutral, according to the hostile or neutral character of the country in which his residence is fixed ; and in England, the law is the same in respect to British subjects.

§ 2. The rule, that the domicil fixes the character, in its verbal statement, is exceedingly plain ; nor is the principle on which its application de-

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(a) The rule is not confined, in its application, to a state of war. It has been determined, that a British merchant, settled in the United States, was entitled, as an American, to all the privileges secured to American citizens by the treaty of 1795. An insurance, upon a trade that was prohibited to him as a British subject, was held to be valid, upon the ground, that, considering him as an American, the trade was lawful under the treaty. *Wilson v. Marryatt*, 8 Term, 31. Sup. Lec. III. § 25, p. 333-4.

pend, difficult to be stated. The intention of the party is the controlling principle. His intention to reside permanently, or for an indefinite period, in the country where he is found, when established by proof, establishes his domicil in the place that he inhabits. Where the party has declared his intention, and his acts have corresponded with the declaration, the question is free from embarrassment; and when the intention of the party is thus certain, the brevity of his actual residence is of no avail to protect him from the consequences of the character he had assumed.

§ 3. The property of a British merchant, who had removed to a Dutch island in the West Indies, at a time when a war between England and Holland was expected, on the breaking out of actual hostilities was condemned, as that of an enemy, although he had resided in the island only a day or two previous to its capitulation to a British force; but he was proved to have gone there with the avowed design of forming a permanent establishment, and by this design he was held to be concluded.(a)

§ 4. In a great majority of the cases, in which the question of domicil arises, the intention of the party is not evidenced by his positive declarations, but as a matter of necessity is to be collected only from circumstances; and these circumstances are so mixed and various, that, in the opinion of Sir W. Scott, we should attempt in vain to embrace them all in a general definition. The most mate-

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(a) Case of Mr. Whitehill, quoted by Sir W. Scott, in the *Diana*, (5 Rob. 60.) Vide the remarks of C. J. Marshall on this case, in *The Venus*, (8 Cranch, 288.)

rial and significant are the formation of new domestic ties ; the nature and extent of the commerce in which the party is engaged ; the time he has resided, or will probably be compelled to remain. When the social connexions of the party are principally in the country where he is living ; when he is married, and is established there with his family, the inference of his intention to reside there permanently, is highly reasonable. Such is also the fair construction, when all the commerce in which he is engaged, has an exclusive reference to the country of his residence ; when it is there that all his enterprises are begun and terminated ; there that his capital, its proceeds and returns are employed, invested or consumed. So, the same inference may be justly drawn, when the commercial business, in which he is engaged, although not exclusively of a foreign character, yet from the number and variety of the transactions that it involves, is of such extent, that a long and indefinite period of residence, will probably be necessary to its completion.

§ 5. Time—in the language of the enlightened judge, whose decisions, the nature of the subject and the deference they so justly claim, compel me so frequently to quote—Time, is the grand ingredient in controlling a domicil. It is one of the few principles that can be generally laid down, and in most cases the effect of time is unavoidably conclusive. It is not unfrequently said, that a special purpose, when it is only with such that a person is gone into a foreign country, is sufficient to repel the presumption, that his residence there fixed his domicil : but the position is not to be taken in an unqualified latitude. Respect must be had to the time that

the purpose, although special, may or shall occupy. If it probably may, or actually does, detain the person for a great length of time, a general residence may well grow upon a special purpose. Such a purpose may lead a man to a country where it shall detain him the whole of his life. Against a residence, therefore, in fact, continued for a long period of time, the plea of an original special purpose is not to be averred. It is a just inference in such a case, that other purposes forced themselves upon the party, mixed themselves with his original design, and impressed upon him the character of the country where he resided. Where a merchant goes into a foreign country, at or before the beginning of a war, it is certainly reasonable, not to bind him too soon to an acquired character. A fair time should be allowed to him to disengage himself; but, should he continue in that country during a good part of the war, contributing, by the payment of taxes and other means, to its strength and security, the plea of a special purpose could never be urged with any effect against the rights of hostility; otherwise there would be no sufficient guard against the fraud and abuses by which the true character of a long continued residence would be veiled under the mask of a pretended original and sole purpose. A time, there certainly is, that will stop such a plea. No rule can fix that time with certainty; but in the nature of things it must exist.(a)

§ 6. The difficulties that naturally belong to the question of domicile, are greatly increased, in mo-

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(a) *The Harmony*, (2 Rob. 322.) Opinion of Sir W. Scott.

dern times, by the active spirit of commerce that now prevails. It is owing to this cause that the same transaction, the same commercial adventure, by a sort of extended circulation, frequently communicates, in its progress, with different countries; beginning, for example, in the United States, travelling to France, thence to England, and thence back again to its place of origin. In such a case the person who has the charge of the complex speculation, and is principally interested in its success, may well be found at no great distance of time in a variety of local situations, so as greatly to perplex the mind of a court, in assigning, accurately, the exact legal effect of his local character, at the different periods of the divided transaction.

§ 7. In the important case, from which the preceding observations have been substantially drawn, the learned judge, in a spirit of liberal and just discrimination, made some remarks relative to the peculiar circumstances of American merchants, visiting Europe for commercial purposes, that deserve to be transcribed and remembered. The particular situation of America in respect to distance, he observed, seems to entitle the merchants of that country to some favorable distinctions. They live at a great distance from Europe; they have not the same ready and open, and constant correspondence with individuals of the several nations of Europe, that these have with each other. They are, on that very account, likely to have their mercantile confidence in Europe abused; and, therefore, to have more frequent calls for a personal attendance to their own concerns; and, it is to be expected, that, when the necessity of their affairs calls them across the Atlantic, they should make



rather a longer stay in the country where they are called, than foreign merchants, who step from a neighboring country in Europe, to which, every day offers an opportunity to return.(a)

§ 8. When the property of a foreigner, who, at the time of its shipment, was living in a hostile country, is seized, as that of an enemy, the captors are not bound to prove, in the first instance, that his place of residence was his actual domicil. The presumption of law is in their favor. The *animus manendi*, the intention to remain, the law imputes to him, and to redeem his property from the noxious imputation, he must give such evidence of his intentions and plans, as shall be effectual to destroy it.(b) The presumption is not repelled, merely by showing that the wife and family of the party were still residing in his native country; he may have separated himself from them; or he may, during the war, have engaged himself wholly in the trade of the hostile country where he resided, and, in such a case, his occupation would be alone sufficient to supersede his neutral character.(c)

§ 9. It is evident, also, from the observations of Sir W. Scott, already given, that the intention which the law attributes to a person residing in a hostile country, is not disproved by evidence, that

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(a) *The Harmony*, (2 Rob. 323.)

(b) *The Bernon*, (1 Rob. 103,) Sir W. Scott, "The presumption arising from residence, is, that the party is there *animo manendi*; it lies upon him to explain it." In the case of *Elbers v. U. Ins. Co.*, (16 Johns. R. 128,) Spencer, J., in delivering the opinion of the court, said, that this rule of the British admiralty "is founded in good sense, and on the plainest principles of public policy." It was adopted, in that case, as the basis of the decision.

(c) *The Venus*, (8 Cranch, 279.) *The Ann*, (1 Dod. 221.)

he contemplated a return to his own country, at some future period. If the period of his return is wholly uncertain—if it remains in doubt at what time, if at all, he will be able to accomplish the design—the design, however seriously entertained, will not avail to refute the legal presumption. A residence, for an indefinite period, is, in the judgment of law, not transitory, but permanent. Even when the party has a fixed intention to return to his own country at a certain period, yet, if a long interval of time—an interval, not of months, but of years—is to elapse, before his plan of removal can be effected, no regard will be had to an intention, of which the execution is so long deferred. When he is necessarily to remain in the country for so long a period, the presumption attaches, that other purposes will force themselves upon him, mix themselves with his original design, and impress upon him the national character of the country where he resides. It seems to be a necessary deduction from the decisions, that a claimant, who is called to prove, in a court of admiralty, that his national character was unaffected by his residence in a foreign country, should be able to show—1. That his past residence had not been of such duration, as, by the mere operation of time, to have established his domicil. 2. That he had not been so mixed and incorporated in the trade or navigation of the country, that its national character was fixed upon him by the very nature of his occupation. 3. That his original intention, in visiting the country, was, to remain there only for a short and definite period. And, lastly, 4. That, to accomplish the purpose of his visit, neither an indefinite, or a very long period of time, would probably be required.

§ 10. It is admitted, that a neutral merchant may lawfully go into a hostile country, even during the war, for the purpose of collecting his debts and withdrawing his funds, and that the property in which he invests the funds that he seeks to withdraw, although shipped during his residence, is exempt from confiscation; but if, whilst in the hostile country, instead of confining himself to the legitimate objects of his visit, he engages in new and wholly unconnected speculations, and in a trade purely national, he is considered as an enemy, in respect to this additional commerce; and the property embarked in it, if captured, is condemned. (a)

§ 11. It is intimated, in some of the decisions, that a neutral merchant, who had been engaged in trade, during peace in an enemy's country, and is resident there when hostilities commence, should be allowed a reasonable time to disentangle himself, by withdrawing his person and effects; and that, during this interval, his property on the ocean should be exempt from capture. This doctrine seems very equitable in itself, and it certainly derives much countenance from the opinions of eminent writers on the law of nations; (b) but it is far from having been established by any positive adjudication of the prize courts in England or in the United States. The actual decisions, it will be seen hereafter, have gone no farther than to extend some indulgence, at the beginning of a war, to the property of a neutral, not resident in the enemies'

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(a) *The Dree Gebroeders*, opinion of Sir W. Scott, (4 Rob. p. 222-4.) *The Adriana*, (1 Rob. opinion, p. 315-16.)

(b) Vattel, liv. 3, c. 4, § 63. Azuni, p. 2, ch. 4, art. 2, § 17.

country ; but so far involved in its commerce that his traffic, if continued during the war, would impress upon him a hostile character. (a)

§ 12. It has been strenuously contended, in the United States, that the reasons that have led to a favorable consideration of the property of neutral merchants, at the commencement of a war, apply, with still greater force, to the condition of the subjects of a belligerent power, who, having acquired a domicil in time of peace, are residing in the enemies' country when hostilities commence. It has, however, been decided, by the Supreme Court of the United States, that the property of American citizens, thus domiciled in England, although shipped before a knowledge of the war between the United States and England, was yet, by that event, irredeemably stamped with a hostile character, the owners, at the time of the capture, as well as of the shipment, being still resident in England. The goods in question were accordingly condemned as lawful prize. (b)

§ 13. The grounds of the decision were, that a merchant, who has permanently settled in a foreign country, is bound by all the consequences of the national character that his domicil impresses. That of this character he cannot divest himself by any other means, than by an actual return to his own country, or by commencing a removal in good faith, and without the intention of resuming his domicil. Consequently, if the country, in which he resides, becomes involved in a war, with that of his alle-

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(a) *The Jacobus Johannes* and the *Ospray*, referred to, by Sir W. Scott, in the *Vigilantia*, (1 *Rob.* p. 14, *post.*)

(b) *The Venus*, (8 *Cranch*, 253.)

giance, his property on the ocean is necessarily liable to be captured, by the cruisers of the latter, as that of an enemy, unless, previous to the capture, his domicil and the national character that it imposed, had been effectually changed. That the doctrine, that a native, or naturalized subject of one country, who is surprised in the country where he is domiciled, by a declaration of war, ought to have time allowed him to make his election, either to continue there, or to return to the country of his proper allegiance, and that, until such election, his property should be protected from capture, it appeared to the majority of the court, was unfounded in equity and reason, as well as in law. That to give to the party such an election, was to place him in a situation wholly anomalous. It was to give him for a time, the privileges of a neutral, in respect to both the belligerents, since by declaring his election, subsequent to a capture of his property, he would be able to save it in every case from final confiscation. If captured by the armed vessels of his adopted country, he would at once rescue it from their grasp, by claiming the rights of the national character, that his domicil had given. If captured by those of his native country, he would compel its restoration, by declaring his intention of an immediate return. Nor was there any hardship in depriving the party of such an election. Its denial, if it rendered his property on the ocean liable to an immediate capture by the vessels of his own country, not only freed it from capture by those of his adopted, but gave him the right to claim their protection. The privilege he would enjoy would, therefore, equal the disadvantages to which he would be exposed, so that the complaint of in-

justice was clearly groundless, while, on the other hand, the double privilege that was claimed, an immunity from capture by either belligerent, was plainly unreasonable, and, therefore, unfit to be granted.

§ 14. From this opinion of the majority of the court, Chief Justice Marshall, and Mr. Justice Livingston, dissented—and the former supported his dissent in an elaborate argument, which, as it bears in an eminent degree, the impress of his vigorous and comprehensive mind, claims, and will amply reward, the diligent perusal of the student. The basis of his argument was the position, that, a mere commercial domicil, wholly acquired in time of peace, necessarily ceases at the commencement of hostilities between the country of the merchant's residence, and that of his allegiance; and this position he expands and illustrates by a great variety of arguments, from various sources. It is only a very condensed view of his reasoning that I shall attempt to exhibit. Where a merchant removes to a foreign country, for commercial purposes, in time of peace, it is reasonable to believe, that he intends to remain only so long as he can carry on his trade, lawfully and advantageously, without a violation of duty to the country of his affections and his allegiance; but the intervention of a war between the country of his residence and his own country, renders the prosecution of a trade, such as he alone contemplated, no longer practicable. Such a war, we are bound to believe, removes the causes, and supersedes the motives that alone induced his foreign residence; and an intention of continued residence, under so material a change of circumstances, ought no longer to be imputed to him. On the contrary, when we consider that the

right of the merchant to remain and prosecute the trade in which he was engaged, is now forfeited—that he has become the enemy of the country in which he resides—that his continuance in it will, probably, expose him to many and serious inconveniences—that his interests and his duty, and most probably, his inclinations, call him home—it seems, not only a fair, but almost a necessary inference, that the change in his situation has produced a change of his intentions ; it, therefore, justifies the presumption, that he means not to continue, but as soon as practicable, to terminate his residence. It is alike impolitic and unjust, to build any argument upon his first residence, of his intention to throw off permanently his original character and allegiance. The very commerce, in which he was engaged, may have had a direct relation to the interests of his own country, may have tended to augment its resources and wealth. No nation that takes an interest in the prosperity of its own commerce, can wish to restrain its own citizens from residing abroad for commercial purposes ; nor will it hastily construe such a residence into a change of national character, to the certain injury of the individual, and probably to its own. Nor is this all. It is the doctrine of the most approved writers on the law of nations, that a citizen of one country, who is residing, but not naturalized, in another, is not incorporated into the foreign society ; but is still considered as a member of that to which he originally belonged. If a war break out between the two nations, he is to be permitted, and it is, in truth, his duty to restore himself, by a speedy removal, to his proper allegiance. It is his duty to free himself from a position, that, by its voluntary

continuance, would render him an enemy of his own country ; and we are bound to presume, that he will avail himself of the earliest means and opportunity to discharge a duty, that the dictates of patriotism, and the law of his allegiance, alike impose. Whilst this presumption continues in force, it is unjust to consider him as an enemy. It is a harsh proceeding of his native country, to confiscate the property of one, who, for aught that appears, may deserve to be ranked among its most attached and devoted citizens. But this presumption, that, while it exists, should shield his property from condemnation, continues to exist, not only until he is proved to have a knowledge of the war, but until a reasonable and sufficient time has been allowed him to disengage himself and effect a removal. It exists, until there is evidence, that after a knowledge of the war, he had continued to reside, without compulsion, or justifiable cause, in the hostile country. When it is proved to be his real intention to change permanently his national character ; where it is his choice to remain in the hostile country, there is no injustice or harshness in treating him as an enemy ; but if, while prosecuting his business in a foreign country, he retained his attachment, and contemplated a return, to his own, it is pressing admiralty principles too far, it is drawing conclusions that the premises do not warrant, to infer absolutely his intention to continue in a country, which has become hostile, merely from his residence and trading in that country while it was friendly, and to punish him by a confiscation of his goods, as if he had been fully convicted of this intention.

§ 15. The Chief Justice concluded by remarking,



that in applying the principles he had laid down to the claimants, the court ought to be regulated by the conduct they had pursued, after a *knowledge of the war*. If they had continued their residence and trade, after a knowledge of the war, it was clear, that their claim to a restitution could not be sustained; but if they had taken immediate measures for returning to the United States, and had since actually returned, or had assigned sufficient reasons for not returning, their property was, in his judgment, capable of restitution, and that by this discrimination some of the claimants, although not all, were entitled to the restoration of their goods.

§ 16. In the course of this opinion, which I have reluctantly abridged, the Chief Justice subjected most of the leading decisions of the English admiralty on the question of domicil, to a strict and searching analysis, and he arrived at the conclusion that they gave no support to the assertion that Sir William Scott had ever advanced or intimated, or would probably maintain, a doctrine repugnant to that he sought to establish. Indeed, the exact case, under circumstances analogous to those in which it was presented to the Supreme Court of the United States, seems never to have arisen in the courts of England.

§ 17. It is necessary, in conclusion, to remark that the claimants in the case which was the subject of this controversy, although naturalized citizens of the United States, were native born subjects of Great Britain, and consequently their residence in England was not properly the acquisition of a new domicil, but, by its necessary effect, a restoration to their original allegiance. Whether the reasoning and views of the Chief Justice were appli-

cable in their full extent, if at all, to such a case, may be seriously doubted; and these doubts may be felt even by those, who assent without difficulty to the soundness and truth of his doctrine, when limited in its application to native subjects or citizens, residing merely, and not naturalized, in a foreign country.

§ 18. The main principle on which the decision in this case was founded, that a subject of a belligerent power, residing and trading in a hostile country, is himself to be considered and treated as an enemy, has never been doubted. It is established or admitted, by Sir William Scott, in many of his decisions.

§ 19. In a case, where the claimant was a British merchant, residing in Holland, during a war between that country and England, he remarked, that it would be a great injustice, if the goods of British merchants, residing in Holland, were to be restored, while those of the merchants of all other nations in the like circumstances, were condemned. "An Englishman, residing and trading in Holland, is as much a Dutch merchant as a Dane or a Swede."<sup>(a)</sup>

§ 20. Nor is this doctrine confined to the courts of prize, or limited in its application to the mere confiscation of the property of a person, thus residing, during a war, in the country of the enemy. Such a person is regarded, in the courts of common law, as an alien enemy, in the fullest sense of

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(a) *The Citto*, (3 Rob. 41.) In the *Diana*, the *Boedes Lust*, and many other cases, the claimants, all or some of them, were British subjects, residing in the enemy's country. Vide Note I. *McConnell v. Hector*, (3 B. & P. 113.)

the term, and is subject, as such, to all the disabilities that attach to the character.(a)

§ 21. But if the continued residence of a subject in a hostile country during the war, is not voluntary, but proceeds from a compulsory restraint, imposed by the hostile government, it will not prevent the restitution of his property, although, before the war, his commercial domicile was established in the same country. If his intention to leave it, was clearly manifested by overt acts, previous to the capture, and the execution of his design was solely prevented by his violent detention, in the judgment of Sir W. Scott, it would be going further than the principle of law requires, to conclude such a person by his former occupation, and his subsequent constrained residence, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means he had used for his removal.(b) There can be no reason to doubt that the protection of this doctrine would be equally extended to a neutral merchant, who, on the breaking out of a war, takes early measures for withdrawing himself from a hostile country, but is violently detained by the government, and, by such detention alone, is debarred from the execution of his purpose.(c)

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(a) *McConnell v. Hector*, opinion of Lord Alvanley, Ch. J., (3 *Bos. & Pull*, p. 114.) Note I.

(b) *The Ocean*, (5 *Rob.* 91.) The reasoning of Sir W. Scott, in this case, certainly lends great support to the argument of Ch. J. Marshall in the *Venus*.

(c) Mr. Phillips has quoted from the opinion of Lord Loughborough, in *Bempde v. Johnstone*, (3 *Ves. jun.* 201,) the following expressions: "The actual place of a man's residence, is, *primâ facie*, his domicile; yet you encounter that, if you show that it is either constrained, or *from the necessity of his affairs*, or transitory; that he is a sojourner." But these ex-

§ 22. There is a peculiar doctrine in the English admiralty, relative to the effect of their domicil, upon the national character of persons residing and trading in a country of the East, under the protection of a European factory. Their case is an exception from the general rule. They do not take their national character from that of the country in which they reside, but solely from that of the establishment by which they are sheltered and protected. The distinction arises from the nature and habits of the countries of the East. In Europe, and in the United States, alien merchants mix freely with the native inhabitants; they form social connections and alliances; they become incorporated into the mass of the society, and are soon undistinguishably fused into the very body of the nation. But the nations of the East, from time immemorial, have kept up, and have been sedulous to preserve, an immiscible character. Foreigners, who visit these countries, are never admitted into the mass of the society; they never become a part of the nation; but, however long they continue to reside, they continue to be strangers and sojourners. "*Doris amara suam non intermiscuit undam.*" Hence, as they do not acquire any national character, under the general sovereignty of the country, if they are not trading under any recognised authority from their own government, they are held with propriety, and even of necessity, to take their character from

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pressions were used in reference to a domicil changing, in time of peace, the legal rights of the party, and are not applicable, in their full extent, to a commercial domicil in time of war. The hostile character of a merchant, resident in an enemy's country, is certainly not divested, by showing that the extent and multiplicity of his affairs were such as to render it necessary that he should remain. (1 *Phil.* 61.)

that of the association or factory, under whose protection they live, and conduct their trade. (a)

§ 23. In a prize cause in the United States, it was attempted to extend this doctrine to British subjects, residing and trading in the kingdom of Portugal, on the ground, that by the special provisions of a treaty between that country and England, the merchants of the latter country, living in Portugal, are entitled to peculiar privileges, that distinguish and separate them from the mass of the native inhabitants, and from all foreigners of other countries; but Mr. Justice Story held the doctrine to be wholly inapplicable. Notwithstanding the peculiar privileges that British merchants, resident in Portugal, enjoy under the treaty, they are still incorporated into the general commerce of the country. They are still subject to the general laws respecting revenue and taxes, to the general duties of qualified allegiance, and to the general regulations of social and domestic, as well as commercial intercourse. This is far different from the case of eastern factories, where the laws of the factory govern the parties who claim protection under it, and no general amenability to the laws of the country is either claimed or exercised. Upon these grounds, the learned judge decided, that British residents in Portugal take the character of

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(a) *The Indian Chief*, opinion of Sir W. Scott, (3 Rob. 29.) *The Twee Frienden*, *The Rachel*, and *The Etrusco*, cited in this case, p. 29, 30, 31. In the first, a native of Smyrna, of French descent, was stamped with the Dutch character, because he was carrying on trade under the protection of the Dutch Consul of Smyrna. In the second, a Jew merchant was impressed with the same character, who was living in a Dutch establishment on the coast of Malabar. And in the third, it was held that a Swiss, whilst trading under the protection of the French factory in China, was to be considered as a Frenchman.

their domicil, and, as to all third parties, are to be deemed Portuguese subjects.(a) The effect of this decision was, that the property claimed, which, had the opposite doctrine prevailed, must have been condemned as belonging to enemies, was restored as neutral.

§ 24. As a general rule, the national character of persons, who reside in a foreign country in a public or representative capacity, is not changed or affected by their residence, whatever may be its duration, or by whatever circumstances, indicative of the intent of the party to render it permanent, it may be accompanied ; nor do I perceive any reason to doubt, that consuls, who owe allegiance to the government which they represent, are within the benefit of this rule. But it is well settled, that, if a foreign consul engage in commerce, he is immediately stamped, with respect to that commerce, with the national character of the country in which he resides, and from which his trade is conducted. His character of consul affords no protection to his mercantile adventures. If he reside in a belligerent country, his ships and goods are liable to confiscation, as those of an enemy, by the opposite belligerent ; and they are subject to the same penalty in the country in which he resides, if they are employed in a trade with its public enemies, which is prohibited to its

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(a) *The San Jose Indiano*, opinion of Story, J., (2 *Gallis*, 293-4.) *The Friendschaft*, opinion of Ch. J. Marshall, (3 *Wheat*. 52.) In the case of the *Danous*, (4 *Rob.* 255, note,) the Lords of Appeal in England determined that a British born subject, resident in the English factory at Lisbon, was, nevertheless, so far clothed with the Portuguese character, as to render his trade with a country at war with England, but not with Portugal, not impeachable. It was held to be the trade of a neutral. Vide also, the *Nayade*, (4 *Rob. Ad. Rep.* 251.)

own subjects. Nor, to warrant the confiscation of his property, is it requisite, that the consul should bear the character of a general merchant. If the transaction, that leads to a seizure, is the only commercial speculation in which he is, or has ever been engaged, he is still a merchant, so far as that transaction extends, and must bear the consequences of the character he has assumed.(a)

§ 25. The rule which thus distinguishes between the mercantile and the official character of a consul may sometimes operate in his favor. Where the consul of a belligerent power is engaged as a merchant, in the commerce of a neutral country, in which he resides, his property on the ocean, if employed in a trade strictly neutral, is exempt from hostile capture. His neutral character, as a merchant, is unaffected by his belligerent character, as consul.(b)

§ 26. The native national character, that has been lost, or partially suspended, by a foreign domicil, easily reverts. The circumstances, by which it may be restored, are much fewer and slighter than those that were originally necessary to effect its change. The adventitious character, that a domicil imposes, ceases with the residence from which it arose. It adheres to the party no longer than he consents to bear it. It is true, his mere intention to remove—an intention not manifested by overt

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(a) *The Indian Chief*, Mr. Millar's case, (3 Rob. 27, 28.) *The Josephine*, (4 Rob. 25.) *The Dree Gebroeders*, (4 Rob. 232. Vide, also, *Vattel*, liv. 4, c. 8. 1 *Wheaton's International Law*, 282. 1 *Kent's Com.* 5th ed., 44—77. *Albrecht v. Sussinan*, (2 Ves. & Beames, 323.) *Arnold v. United Ins. Co.* (1 Johns. Cases, 363.)

(b) *The Sarah Christiansa*, opinion of Sir W. Scott, (1 Rob. 239.)

acts, but existing secretly in his own breast, and liable to be hourly revoked—is not sufficient to efface the character that his domicil impressed; something more than mere verbal declarations, some solid fact, showing that the party is in the act of withdrawing, is always necessary to be proved; still, neither his actual return to his own country, nor even his actual departure from the territories of that in which he resided, is indispensable. If he has commenced his journey, has put himself in motion to return, and is in the actual pursuit of his original character, with the intention, in good faith, to abandon and never resume his foreign domicil, he is freed at once from its legal consequences, and at once restored to all the rights and privileges of his native allegiance.(a) He has ceased to be a subject of the country in which his domicil was fixed, and consequently has ceased to be an enemy of any other with which that country was engaged in war; and, upon proof of these facts, his captured property, although shipped from a hostile country, within the limits of which he still remained, will be restored.

§ 27. When the national character of a person whose property has been seized as that of an enemy, or of a subject trading with the enemy, is sought to be established only by proof of his domicil, the English admiralty appears to have allowed

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(a) The Indian Chief, Mr. Johnson's case, (3 Rob. 20, 21.) Sir W. Scott—"The adventitious character no longer attaches to him, from the moment he puts himself in motion *bonâ fide* to quit the country *sine animo revertendi*." Mr. Curtissos' Case, (3 Rob. 21, in notis.) La Virginie, (5 Rob. 98.) The President, (5 Rob. 277.) The Ann Green, (1 Gall. 274.) The Joseph, (1 Gall. 545.) The Francis, (1 Gall. 614.) The St. Lawrence, (1 Gall. 467.) The Venus, (8 Cranch, 299.)



an important exception from the general rule, that the national character of property on the ocean cannot be changed *in transitu*, during the prosecution of the voyage ; a rule, to which, in other cases, apparently of equal hardship, we have seen that it inflexibly adheres. (a) To entitle a claimant to restitution, who founds his claim upon the allegation that he had divested himself of his acquired character, it is not necessary for him to prove, that his intention to change his domicil, had been manifested by decisive overt acts, previous to the shipment of the property, or the inception of the voyage ; but, if he is able to show that the residence on which the captors relied, as fixing his character, had been changed, in fact, or in judgment of law, previous to the capture, his claim to a restitution will be allowed. (b) We have already seen that, in the opinion of Chief Justice Marshall, the claims of a subject resident in an enemy's country, ought to be, and in the English court of prize, would be allowed, if the goods were shipped before his knowledge of the war, even when his actual return, or the measures proving his intention to return to his own country, were subsequent to the capture, and that, in such a case, the rights of the claimant would be determined, solely, by his national character, at the time of adjudication.

§ 28. It is certainly doubtful, upon the English authorities, whether there are any overt acts, mani-

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(a) Sup. *The Dankebaar Africaan*. *The Herstelder*. *The Boedes Lust*.

(b) *Mr. Johnson's Case*. *Indian Chief*, ut. sup. *The Etrusco*, cited, (8 Rob. 31.) Vide Note II.

festing the intention of the party to change his domicil, and resume his native character, that can be admitted in evidence, other than his actual return, or his putting himself in motion to return, to his own country, or its possessions. In a case, however, to which I have already referred, the only act, on which Sir William Scott relied, as evidence of the intentions of the party, was, that he had made arrangements for withdrawing himself as a partner from a house of trade in the hostile country ;(a) and, in the judgment of Chief Justice Marshall, dissolution of partnership, discontinuance of trade in the enemy's country, a settlement of accounts, and other arrangements obviously preparatory to a change of residence, ought all to be considered as overt acts, that, when shown to be performed in good faith, entitle the claimant to restitution.(b)

§ 29. In the United States, however, the doctrine, that excludes the evidence of these and similar facts, and admits no other proof as sufficient to restore the native character, than the actual return of the party to his native country, or his commencement of a journey to return, with the intent of remaining permanently, must be regarded as firmly and finally established.

§ 30. The cases, in which the party's commencing a journey, putting himself in motion to return, to his native country—has been held to exempt his property, from the hostile character acquired by residence, are cases, where such proper-

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(a) *The Ocean*, (5 *Rob.* 91.)

(b) Opinion in the *Venus*, *ut. sup.* *The Francis*, (1 *Gallis*, 614.)  
*The Frances*, (8 *Cranch*, 335.)

ty has been engaged in a trade completely lawful in the native character. The principle never has been, nor, with propriety, can be extended to protect a trade, which is illegal in a native subject or citizen, and more especially a trade that the native character would render noxious in the highest degree; and this distinction, in the opinion of Mr. J. Story, pervades and reconciles all the cases.

§ 31. An American citizen, who, previous to the last war between Great Britain and the United States, was domiciled in England, shipped merchandise from that country, for the United States, a long time after the war, and, of course, with a perfect knowledge of the fact, and, in person, accompanied the shipment; and it was insisted, that, as he had thus abandoned his English domicil, and was proceeding to resume his American character, his property was protected from American capture and condemnation. But Mr. Justice Story rejected his claim, and the argument on which it was founded. No American citizen can lawfully go to a hostile country during war, and take away merchandise there purchased, whether the purchase was made before or during the war; and it was absurd to suppose, that the previous domicil of the citizen, in the enemy country, could confer upon him any higher privileges. Whether the claimant was an English subject, or, by this change of domicil, an American citizen, his property was equally liable to confiscation; upon the first supposition, as that of an enemy, and, upon the second, as that of a citizen, unlawfully trading with the enemy.(a)

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(a) *The St. Lawrence*, M'Gregor's claim, (1 *Gall.* 471.) *The William*, cited in the *Hoop*, (1 *Rob.* 214.) The decision of Mr. Justice Story, on

§ 32. The preceding case suggests an important distinction, to which it is necessary to advert. The right of a neutral merchant to withdraw his property and funds from a hostile country, either on the breaking out of hostilities, or at any time during the war, if the withdrawal be preceded or accompanied by an effectual change of his own domicil, is established and undoubted ; but a similar right in a subject or citizen of a belligerent state, if it exist at all, in order to escape the imputation and penalty of a trade with the enemy, must, doubtless, be limited in its exercise, to a short and reasonable period after his knowledge of hostilities ; or, if its exercise be delayed, the delay must be shown to have proceeded from necessity or compulsion. (a) Whether the right, even with these limitations, is to be considered as existing at all, must be regarded as a question still unsettled, in the courts of the United States ; but I postpone its consideration, as belonging, more properly, to the next division of our subject.

§ 33. The mere return of a party, whether a belligerent subject, or a neutral, to his native country, is not sufficient of itself, as already intimated, to restore his native character. If he visits his own country for a special and temporary purpose, and designs, when this is accomplished, to return to his former place of residence, where he still retains his commercial establishment, his domicil,

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M'Gregor's claim, was confirmed by the Supreme Court of the United States, (9 *Cranch*, 120.) Vide also, *Amory v. M'Gregor*, (15 *Johns.* 36,) and *The Mary*, (9 *Cranch*, 147.)

(a) *The Diana*, *The Ocean*, *The President*, Sup., and *The Madonna Delle Gracie*, (4 *Rob.* 195.) Post, Lec. VI. § 9, 10, 11.

and the character that it impresses, remain unchanged ; and in such a case, and when his domicil is fixed in a foreign country, his property on the ocean, although shipped, or captured during his absence, remains liable to confiscation. (a) In fewer words, a domicil once established is not broken up by a temporary change of residence. The change must be permanent and entire, in the intention of the party, and the facts, by which it is evidenced, must correspond with the alleged intention.

§ 34. In the application of the general rule, that the national character of a party must be taken from that of the country in which he resides, there is a material distinction, between the case of a native subject, who owes a permanent allegiance, and that of a foreigner, whose allegiance, as depending solely upon his residence, is local and temporary. (b) Although the adventitious character ceases with the residence from which it arose, the native character remains, until, by the acquisition of a new domicil, it is proved to have been effectually changed ; and to produce this change, the actual settlement of the native subject in a foreign country, is, doubtless, necessary to be shown. The intention to remove permanently, although evidenced by the same overt acts that are deemed conclusive in the case of a person, who is in pursuit of his original character, would be wholly insufficient. Hence the property

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(a) *The Friendschaft*, (3 *Wheat.* 52.) *The Ann Green*, (1 *Gallis*, 274.) *The Nereide*, (9 *Cranch*, 414.) *The Jonge Ruiter*, (1 *Acton's Appeal Cases*, 116.)

(b) *Sparenburgh v. Baunatyne*, (1 *Bos. & Pull.* 163.) (1 *Kent's Com.* 5th ed., 71, 72.)

of every person, who is an enemy by his native character, is presumptively liable to confiscation, without regard to his local situation at the time of its shipment, or capture. The burthen of proof to redeem it from this penalty is cast upon him. It is incumbent upon him to show, not only that he was living in a foreign and friendly country at the time his goods were shipped, or his vessel sailed, and at the time of the capture; but that his previous residence in the country had been of such duration, or attended by such circumstances, as to repel the presumption that it was transient and occasional, by clothing it with the attributes of a legal domicil.

§ 35. In the United States, it appears to be settled law, that a native subject cannot acquire a foreign domicil by an emigration from his own country, during the existence of hostilities, (*flagrante bello*,) so as to protect his trade during the war, either against the belligerent claims of his own country, or against those of a hostile power. (a) In other words, his native character is wholly unchanged by his change of residence. He is as much bound to abstain from a trade with the public enemies of his own country, as if he had remained at home; and his property, as that of an enemy, continues to be just as liable to seizure and confiscation, by an opposite belligerent. The ground of this doctrine is, that there rests, upon every subject or citizen, a moral obligation, not to abandon his

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(a) Note III. The *Dos Hermanos*, (2 *Wheat.* 78.) *Duguet v. Rhinelander*, (1 *Johns. Cases*, 360.) *Jackson v. N. Y. Ins. Co.*, (2 *Johns. Cases*, 191.) Contra—*Duguet v. Rhinelander*, (1 *Caines' Cases in Error*, xxv.) S. C. (2 *Johns. Cases*, 476.) *Vattel*, liv. 1, c. 19, liv. 2, c. 27. *Grotius De Jur. Bel. ac Pac.*, liv. 2, c. 5, § 2. *Puffendorf, Droit des Gens par Barbeyrac*, liv. 8, c. 11, § 3.

country in a time of war, without the express sanction of the government. The personal services, and the property, of each separate individual, are a component part of the national resources, on which the government relies, in declaring a war; and to withdraw these, when his country may require their aid, is a breach of the duty that springs from the necessary relation that each individual bears to the political society of which he is a member. A contrary doctrine, it has been truly observed, would be inconsistent with the soundest maxims of national policy, since it would enable and encourage mercantile men, at the commencement of every war, to change their residence and character, in order to exempt themselves from its necessary burdens and apprehended losses. It is for these reasons, that the principle in question has been sanctioned, by many of the most approved writers on the law of nations; and, although it has not yet been expressly affirmed, so far as I have been able to discover, by any decision of the English admiralty, I doubt not that its authority, as binding on the court, should the question arise, would be promptly admitted and followed.

§ 36. It has already appeared that, in many cases, (a) the nature of the traffic or business in which an individual is engaged, may stamp upon him a national character, wholly independent of that which his place of residence would alone impose, and there are other cases of the same kind, that, as ex-

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(a) *The Vigilantia*, *The Embden*, *The Vrow Elizabeth*, *The Argo*, *The Jemmy*, *The Princessa*, *The Susa*, *The Phoenix*, *The San Jose Indiano*, and other cases.

ceptions from the general rule of domicile, it is proper, should now be stated.

§ 37. As a general rule, a neutral merchant, trading, in the ordinary manner, to the country of a belligerent, does not contract the character of a person domiciled there, by the mere residence of a stationed agent, because, generally, the effect of such an agency is contradicted by the nature of the trade, and the neutral residence and character of the merchant himself; but the case is wholly different, where the principal is not trading on the footing of an ordinary merchant, but as a privileged trader is engaged in a commerce that none but the subjects of the enemy are permitted to conduct, or that can only be carried on by a special license from the government. In such a case, the nature of his trade, no longer protects him. On the contrary, it impresses him with a hostile character, and renders all his property embarked in it, liable to confiscation, as that of an enemy. (a)

§ 38. If a person, who had withdrawn to a neutral country on the breaking out of hostilities, still retains a house of trade in the hostile country which he left, either as a partner or on his sole account, all the commerce of that house, notwithstanding his own change of domicile is regarded as essentially hostile, and all his property engaged in it continues liable to condemnation. (b) And the rule equally applies where the neutral merchant had never resided in the enemy country; but connects

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(a) *The Anna Catharina*, opinion of Sir W. Scott, (4 Rob. 119,) adopted by Mr. Justice Story, in the *Ann Green*, and the *San Jose Indiano*, (1 *Kent's Commentaries*, p. 77.)

(b) *The Portland*, (3 Rob. 41.) *The Nancy*, (1 Rob. 14-15.)



himself during the war, or retains a previous connection, with a house of trade there established. This rule has been recognized, and with apparent reluctance, adopted and enforced, by the Supreme Court of the United States, who observed that they considered it to be so inflexibly settled, that they could not feel themselves at liberty to dissent from it, whatever doubts might have been entertained, had the question been entirely new.(a)

§ 39. There is, however, a material distinction between the effect of a hostile character, that results solely from the nature of the traffic in which an individual is engaged, and that which his domicile impresses. A foreign merchant, who resides permanently in the country of the enemy, is himself an enemy, in the same sense, and to the same extent, as a native subject; so that all his property on the ocean, wherever it may be found, and whatever may be the nature of the commerce in which it is embarked, is liable to confiscation; but when a hostile character arises solely from the hostile nature of the traffic, it is limited, in its noxious and penal effects, to the transactions and property that the prohibited trade embraces; so that the merchant, on whom it is impressed, in regard to other distinct independent transactions, still retains the rights and immunity of a subject, an ally, or a neutral.

§ 40. Thus, where a neutral merchant, who is connected with a house of trade in a hostile country, is, also, interested in another and separate establishment, in a country that is neutral, and in

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(a) *The Friendschaft*, (4 *Wheat*, 107.) Vide, also, *The San Jose Indiano*, (2 *Gallis*, 268.)

which he resides, his share in the property exclusively invested or engaged in the concerns of the latter, is exempt from confiscation ; and this protection will be extended to him, where the affairs of the two houses are plainly distinct, even when the same persons are the partners in each.(a)

§ 41. The same principle applies, where a merchant has neither his domicil, nor a house of trade in the enemy country, but visits it frequently for mercantile purposes, and engages, while there, in the general commerce of the country ; he is liable to be considered as an enemy, in respect to all the transactions thus originating, while his temporary residence has no effect upon his general character. In respect to other and distinct transactions, he may still be entitled to the protection of a subject, or friend. In this, as in the preceding case, in the judgment of a court of prize, the same individual, in reference to different transactions, may sustain, during the same period of time, two different, and even opposite, national characters. In the words of Sir William Scott, a man may have mercantile concerns in two countries, and if he acts as a merchant of both, is liable to be considered as a subject of both, with regard to the transactions originating in them respectively.(b)

§ 42. It is not, however, in all cases, that the property of a neutral partner in a house of trade established in a hostile country, will be considered as liable to condemnation. When the capture of

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(a) *The Herman*, (4 Rob. 230.) *The Antonia Johanna*, (1 Wheat. 159.) *The Indiana*, cited, (3 Rob. 44.) Opinion of Story, J., in the *San Jose Indiano*, (2 Gallis, 291.)

(b) *The Jonge Klassina*, (5 Rob. 302.) Acknowledged—*Elbers v. U. Ins. Co.* (16 Johns. 133.)

goods, shipped on account of the house, is made at the commencement of the war, the share of the partner, resident in a neutral country, it has been determined, may be restored ; while those of the partners, domiciled in that of the enemy, are condemned. The ground of the exception is, that neutral merchants, engaged habitually in a trade with a hostile country, but not resident there, should have time to withdraw themselves from the obnoxious commerce, and that it would be pressing too heavily upon neutrals, thus situated, to subject their goods to confiscation, immediately on the breaking out of a war.(a) From the language of the report, it is fairly to be inferred, that the exception was intended to embrace shipments, made with a knowledge of the war, if made within a reasonable time after its commencement, since the neutral could hardly be expected to take measures for withdrawing himself from his habitual commerce, until, as hostile, it became illegal and hazardous. Unless the time meant to be allowed him, is to be computed from his knowledge of the existence of hostilities, the pretended indulgence would be, in most cases, nominal and nugatory.

§ 43. To conclude this subject, a single case remains to be stated, in which the national character of the party is derived, not from the nature of his traffic, but from that of his habitual employment. A person who is employed habitually and constantly, as a master or mariner, and, doubtless, as a commercial agent or supercargo, in the navigation of a hostile country, although

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(a) The *Jacobus Johannes*, and the *Ospray*, cited by Sir W. Scott, in the *Vigilantia*, (1 Rob. 14.)

he has no domicil there, in the civil and legal sense of the term, is yet impressed with its national character, and this hostile character spreads itself, in its consequences, *generally* over his affairs. It follows, and involves all his property, in whatever trade employed, that does not appear from other circumstances to have acquired a distinct national character. In order to redeem it from confiscation, upon this ground, the burthen of proof is cast upon him. (a)

§ 44. The general reasons that explain and vindicate the propriety of the decisions, by which the property of a neutral merchant, not resident in a hostile country, is, from peculiar circumstances, considered liable to be condemned as prize, are luminously stated by Mr. Justice Story, in language that reflects the spirit, and emulates the style of the illustrious judge, whose doctrines he adopts and defends. (b) In his judgment, the principle to be extracted from the cases "is, that where a person is engaged in the ordinary or extraordinary commerce of an enemy's country, upon the same footing, and with the same advantages, as native resident subjects, his property, *so employed*, is to be deemed incorporated into the general commerce of that country, and subject to confiscation, be his residence where it may. And the principle seems founded in reason. Such a trade, so carried on, has a direct and immediate effect in aiding the resources and revenue of the enemy, and in warding off the pressure of the war. It is not distinguish-

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(a) *The Vriendschap, Barends*, (14 *Rob.* 167.) *The Embden*, (1 *Rob.* 17.)

(b) *The San Jose Indiano*, opinion Story, J., (2 *Gallis*, p. 286.)

able from the ordinary trade of his native subjects. It subserves his manufactures and industry, and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation, in the same manner, as if the trade were pursued by native subjects. There is no reason, therefore, why he, who thus enjoys the protection and benefits of the enemy's country, should not, *in reference to such a trade*, share its dangers and its losses. It would be too much to hold him entitled, by a mere neutral residence, to carry on a substantially hostile commerce, and, at the same time, possess all the advantages of a neutral character."

§ 45. In closing this discussion, it is proper to notice a singular error, into which Mr. Marshall has inadvertently fallen, on the subject of domicil; an error, by which an incautious reader, from a just deference to the authority of this learned writer, may be easily misled. He states it to have been determined, by the Court of King's Bench, and refers to the case, that "a neutral, though residing in the enemy's country, and carrying on trade there, even in partnership with an alien enemy, may yet insure his interest in the joint property."(*a*) We have seen that in such a case, the share of the neutral partner is, generally speaking, liable to be condemned as prize, even when he himself resides in a neutral country; and that when his domicil, or even transient residence, is in the hostile country, its condemnation is inevitable. Hence, had a single decision been made, in the very terms that the learned Sergeant supposes, it would be impossible to regard it as a valid and binding authority. Such

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(*a*) 1 Marsh. 45. The case relied on is *Rotch v. Edie*, (6 Term, 413.)

a decision, if followed, would operate as an entire subversion of the principles on which the whole doctrine of domicil is founded. It has, however, been conclusively shown,<sup>(a)</sup> that this able writer, (whose general accuracy is admitted by all, and is not meant to be impeached,) has, in this instance, misunderstood the facts of the case on which he relies, and consequently, has misstated the purport and legal effect of the decision. The assured, who was an American citizen, effected an insurance in England on his share in certain vessels, in which he was jointly interested, not as partner, but as part owner, with a French subject. After effecting the policy, he returned to France, where he had previously resided, and was there when the loss, which was occasioned by an act (an embargo) of the French government, was alleged to have happened.

There was no war between England and France, the supposed enemy's country, either when the policy was effected, or the loss happened; and although hostilities had broken out before the suit was commenced, the plaintiff had then returned to England, where he had afterwards continued to reside. The contract, therefore, was not an insurance upon enemy's property, in any sense of the term; it was valid, when made, and when the loss happened. Nor was the plaintiff under any disability to sue as an alien enemy, for by his return to England, he had divested himself of the national character that his previous residence in France had probably impressed. The only questions in the cause, were—1. Whether a detention, by an em-

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(a) By Mr. (now Lord) Campbell, (1 *Camp.* 76, note.)

bargo, was a sufficient cause of abandonment ? and, 2. Whether the plaintiff could lawfully insure against the acts of the French government, to which, from his domicil, he owed a temporary allegiance ? And it was only in support of this second objection, that the defendant's counsel referred to the plaintiff's residence in France—not, as showing, that he was himself to be considered as an enemy, and the insurance, on that ground, invalid. It was justly determined by the court, that the objections relied on were insufficient to prevent a recovery of the loss ; but the decision neither affirmed, nor, by possibility, could have been meant to imply, that a neutral merchant, domiciled in an enemy's country, during a war, retains his neutral character ; so that an insurance upon his property, made in the country of the opposite belligerent, is lawful and valid.

§ 46. It is not merely in the ships of the enemy that the goods of an enemy are liable to hostile seizure and confiscation. They are equally so when found on board a neutral ship ; for although the opposite rule, that the character of the vessel shall protect the cargo, or, as it is briefly expressed, that “Free ships make free goods,” has been adopted in numerous treaties, there is no pretence for saying that it has ever constituted a part of the general law of nations. On the contrary, the doctrine that subjects to capture and condemnation, as prize of war, the goods of an enemy, in neutral vessels, is sanctioned by the constant usage of the nations of Europe, from the earliest times, and is admitted to be fully established, by the most eminent writers on public law.(a) It is, therefore, not

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(a) *Consol del Mar.* c. 273. *Grotius de Jur. B. & P.* lib. 3, c. 6,

to be denied, that England was fully justified in her resistance to the famous coalition of the northern powers of Europe, who, in 1780, and in 1801, endeavored, by their compact of an armed neutrality, to compel her adoption of the rule, that a neutral flag shall protect the cargo, and, in effect, exclude absolutely the belligerent rights of visitation and search. A hostile coalition, for such a purpose, is an attempt to change, by violence, the law and practice of ages.

§ 47. But the transportation of the goods of an enemy by a neutral vessel, although subjecting the vessel to a search and detention, involves no violation of belligerent rights by the neutral carrier. It is an innocent and lawful act. The vessel is, indeed, not only subject, to a detention at sea, but may be carried into a port of the capturing power, that the hostile goods may be there unladen, and the necessary steps be taken for their condemnation; but she is not liable to any penalty in the proper sense of the term. On the contrary, as a general rule, the master is entitled to receive his full freight for the transportation of the goods, from the captors; a delivery to them being considered as equivalent to a delivery to the consignee.(a) It is true, that the ordinance of Louis XIV. dooms to confiscation the neutral vessel, as well as the hostile goods; but Valin confesses, that this rigid rule, which was subsequently abandoned by France herself,(b) was pe-

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§ 6-26.) Bynkershoek, Quæst. Jur. Pub. lib. 1, c. 14. Vattel, lib. 3, ch. 7, § 115. Loccenius De Jure Mar. lib. 2, c. 14, § 12. Azuni de droit Marit, pt. 2, c. 3, art. 12. 2 Wheat. International Law, 160.

(a) The Atlas, (3 Rob. 304, note.) When there is a spoliation, or suppression of papers, by the master, it destroys the claim to freight. The owners, although innocent, are affected by his act. The Rising Sun, (2 Rob. 104.) The Emanuel, (1 Rob. 296.)

(b) In. 1744.



culiar to the jurisprudence of France and Spain, and that the usage of other nations had always been to condemn the goods, and to release the vessel. In the English admiralty, it is believed, that this usage has prevailed without interruption.(a)

§ 48. Although the transportation of an enemy's goods, by a neutral vessel, implies no guilt, and induces no forfeiture, I am by no means prepared to affirm, that an insurance, upon a vessel so employed, if made in the country of the opposite belligerent, would be sustained by its courts as a lawful and valid contract. The direct question seems never to have arisen, but, upon principle, it certainly appears doubtful, whether a contract, having a direct tendency to assist and promote the commerce of the enemy, and by greatly multiplying the chances of its escape, in a measure, to shield it from the pressure of the war, would not be declared illegal, as contrary to the interests of the nation, and the policy of the state.(b) This reasoning, however, if applicable to the vessel, is not to be extended to an insurance upon the goods of a neutral owner, transported in the same vessel with those of an enemy. The assured, in such a case, ought not to be affected by an employment of the ship, that he had no right to prevent, and of which, he may be fairly presumed, to have been wholly ignorant. It has, accordingly, been determined, that such an insurance is not only valid, as an indemnity against the general perils of the voyage, but, that the insurer is responsible for every incidental loss, whether partial or total, that may result to the goods

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(a) 2 Valin Com. liv. 3, tit. ix., Des Prises, Art. 9; p. 252, 253.

(b) But see the opinion of Lord Ellenborough, in *Barker v. Blakes*, Note IV.

from the arrest and detention of the vessel.(a) When, by these means, the voyage, as to the goods, is totally lost, there is a right to abandon, and, in all cases, the actual expenses are recoverable, as a partial loss. This decision may be fairly considered as establishing the general principle, that, where there is no illegality in the voyage, the subject insured, or the conduct of the assured, the insurer is bound to indemnify him, under the general terms of the policy, for every loss that proceeds from the acts of his own government, even in the just exercise of its belligerent rights. That this responsibility exists in all cases, where the capture of the vessel or goods is wholly unlawful, does not appear on any occasion to have been doubted, and, in the actual decision to which I have referred, is necessarily assumed and implied.

§ 49. The rule, that the character of the flag is not permitted to determine the character and fate of the cargo, applies as well to the ships of the enemy as to those of a neutral power. It is by virtue of the rule, thus applied, that the goods of a neutral, in an enemy ship, when the right of property is clearly established, are not involved in the fate of the vessel, but are rescued from confiscation and restored to the owner ;(b) yet, for reasons

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(a) *Barker v. Blakes*, (9 *East*, 283. Vide Note IV. *Visger v. Prescott*, (5 *Esp.* 185.)

(b) This rule is as ancient and as well established, as that in relation to enemy's goods in a neutral ship, and rests upon the same authorities. The captors of an enemy ship, in which neutral goods are found, which are restored, are not entitled, by the rule of the English admiralty, to freight from the owners, unless the goods are carried to the port of their original destination, or to a port, which, it is certain, the owners, under the peculiar circumstances, would have selected. *The Fortuna*, (4 *Rob.* 278.) *The Diana*, (5 *Rob.* 71-72.) *The Consolato Del Mare*, (C. 273,) decides, that freight is to be paid to the captors, in all cases ; but the

too obvious to be stated, I cannot believe, that neutral goods, which are to be transported in a ship of the enemy, would be deemed a legitimate object of insurance in the country of the opposite belligerent. In the absence of any opposite decision or authority, I must regard this as one of the cases in which the contract is void, although the property insured is not liable to condemnation.

§ 50. Upon the supposition, however, that neutral goods, in an enemy vessel, may be lawfully insured, the contract is only valid when the goods are accompanied with such documents as shall clearly evince their national character, since the absence of these is, in itself, a substantive cause of condemnation. It is an established rule of the law of prize, that all goods found in an enemy's ship, are presumed to be enemy's property ;(a) and this presumption is only repelled, when the accompanying documents are sufficient to impress upon the property a distinct neutral character. If these are insufficient, further proof is never allowed, and the penalty of forfeiture justly attaches. It has been truly observed, that any other course would subject the prize tribunals to endless impositions and frauds, and enable the enemy, thus obtaining the benefit of further proof, to evade, by supplying the documentary evidence, the just rights of the captors.(b)

§ 51. It is not only in the case that has been stated, that the absence of the necessary proof of

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injustice of this rule, unless confined to the cases above stated, has been clearly shown by Bynkershoek, (*Quæst. Jur. Pub.* l. 1 c. 13.)

(a) *Res in hostium navibus, præsumuntur esse hostium donec contrarium probetur.* Loccenius, lib. 2, cap. 4, n. 11.

(b) *The Flying Fish*, (2 *Gallis*, 374-5, S. P.) *The London Packet*, (1 *Mason*, 14.)

title leads to the condemnation of the property captured. It is the duty, in all cases, of a neutral claimant to establish his claim by positive evidence; for when the documents that accompany the ship or goods are insufficient to show affirmatively their national character, until the contrary is proved, it is presumed that they belong to the enemy. It is only, however, when the character of the ship is certainly hostile, that this presumption cannot be refuted by additional evidence. In other cases, a reasonable time for the production of further proof is allowed, and it is only upon the failure to produce this proof, or its unsatisfactory nature when produced, that the court proceeds to a condemnation.<sup>(a)</sup>

The concealment or destruction, or, as it is termed, the spoliation of papers, relative to the title of the property, by the master of a captured vessel, or other agent of the owners, is visited, in many cases, with the penalty of forfeiture; but it is to the last division of our subject that the consideration of these cases properly belongs.

§ 52. In determining the question of enemies' property, a court of prize looks only to the legal title; and when, from the papers, the right of property in a captured ship, or her cargo, appears to be vested in an enemy, no equitable or secret liens, either in favor of a neutral or of a subject, can be made the foundation of a claim, to defeat or vary the rights of the captors.

A ship, originally American, but which had been sold to a Spanish merchant during a war between

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(a) The reader will find, in a note, what are the documents usually necessary to be produced as evidence of title. Vide Note V.

England and Spain, was captured on her voyage, documented as a Spanish ship, and bearing the flag and pass of Spain. A claim was interposed on behalf of her former American owner, alleging that, by the contract of sale, he had retained a *lien* upon the vessel for the purchase money, to the benefit of which he was still entitled ; but it was held, by Sir W. Scott, that such an interest could not be deemed sufficient to support a claim of property in a court of prize. It is upon the gross, tangible property that captors lay their hands, and the outstanding claims of other parties, however just in themselves, can have no operation upon them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make a seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by *liens* which could not, in any manner, come to their knowledge. It would be equally impossible for the court, which is to decide upon the question, to admit such considerations. The doctrine of *liens* depends, very much, upon the particular rules of jurisprudence that prevail in different countries ; and these rules, in all their extent, and in all the diversity of their application, must be perfectly known to the court, to enable it to decide judicially upon the claims which they are invoked to sustain. A court of prize, from necessity, therefore, is obliged to shut the door against such discussions, and, with scarcely any exception, to decide on the simple title of property.(a)

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(a) The *Marianna*, (6 Rob. 24.) The *Francis*, Irving's Claim, (8 Vanech, 418.)

§ 53. The only exception from this general rule, seems to be in favor of a lien, that is immediately and visibly incumbent upon the property, and which, consequently, the party, claiming its benefit, has the means of enforcing. Such is the freight due to the neutral carrier of enemies' property. A captor, who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship, because the owner of the ship has the cargo in his possession, subject to his demand, by the general law, independent of any contract. By that law, he is not bound to part with it, except upon payment of his freight. Having the possession, he requires not the aid of a court, but may detain the property, and satisfy his claim out of it, by his own authority. The lien in this case, is an interest directly and visibly residing in the substance of the thing itself; but the case is widely different, when the lien, which is made the foundation of a claim, arises solely from a private contract of the parties, and from its nature, is only capable of being enforced by a legal process. It would be dangerous to extend the same favorable consideration to a mere right of action, since, it is obvious, that claims of this nature may be so framed that the courts of prize could never be enabled to examine them with effect, and collusion might be practiced, to a great extent, without the possibility of a discovery. The captor has no access to the original private understanding of the parties in framing their contracts; no means of ascertaining their real nature and object, and it is, therefore, unfit that he should be affected by them. Nor is this doctrine unequitable in itself, or partial in its application. As the rights of capture act

upon hostile property without regard to secret neutral liens, so when the property is neutral, it is protected from capture without regard to the secret liens of an enemy. It is evident too, that it would be almost impossible for a captor to discover the existence of secret liens in favor of an enemy; hence were such liens to be admitted when claimed by a neutral, the captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could rarely, if ever, entitle himself to any advantage from hostile liens upon neutral property.

Such, substantially was the reasoning of Sir William Scott, in pronouncing his decision, that a British subject, the holder of a bottomry bond, given in time of peace for the repairs of the vessel—a contract usually regarded by the court with peculiar attention and favor—could not be allowed to enforce his claim against the captors, although the denial of the remedy was, in this case, the total loss of the debt.(a)

§ 54. It seems a just deduction, from the decisions on this question, that the secret lien of a subject or neutral upon enemies' property, although not an immediate subject of confiscation, cannot be regarded as a legitimate object of insurance.

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(a) *The Tobago*, (5 Rob. 218.) The distinction between the two classes of liens, is properly expressed in the language of the civil law; a lien, accompanied with possession—a visible lien, is a *jus in re*; a lien depending wholly upon contract, a *jus ad rem*. The doctrine of the English admiralty is admitted and followed by Mr. J. Story. *The San Jose Indiano*, (2 Gallis, 284,) and most explicitly by the Supreme Court of the United States in the *Francis*, Irving's claim, (8 Cranch, 418.) A claim for a general average by the ship, against the cargo, stands upon the same ground as the freight; it is a visible lien, a *jus in re*; but a similar claim of the cargo, against the ship, is never allowed; although not arising from a contract, it is a secret lien, capable of being enforced only by legal process. *The Hoffnung*, (6 Rob. 383.)

As a claim, founded upon such a lien, is never allowed in a court of prize, the interest is, in truth, extinguished by the condemnation of the property, and the result to the owner is precisely the same, as if its extinguishment were, in terms, embraced in the judgment of the court. A decree of the whole property to the captors, is a virtual confiscation of all the interests that were attached to it. As the loss, therefore, proceeds directly from a hostile act of his own government, it is plainly a risk that the underwriter is not permitted to assume.

§ 55. To close this division of our subject, it remains only to state the cases in which, as exceptions from the general rule, the property of an enemy on the ocean, is exempt from capture.

§ 56. A vessel employed as a cartel—that is, in the transportation of prisoners of war, with a view to their exchange, from one belligerent country to another—by the law of nations, is protected from every form of hostile aggression, during her passage, both going and returning, (*eundo et redeundo*), and there is no reason to doubt, that an insurance upon such a ship, during her employment, although made in the country of the opposite belligerent, would be valid.(a)

§ 57. The sacred and inviolable character of a cartel ship, arises from the nature of the service in which she is employed—its inestimable utility to all nations engaged in war—but the preservation of that character depends upon the strict observance, by the owner and master, of the wise restraints that the law of nations has imposed. The service in

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(a) *The Daifjie*, (3 Rob. 139.) *La Gloria*, (5 Rob. 192.) *The Mary*, (*ibid.* 200.)



which she is engaged, is so highly important to the interests of humanity, that it is peculiarly incumbent on the parties, to be careful to conduct it in such a manner, as that it shall not become a subject of distrust and jealousy to the two belligerent powers. The interruption of the exchange of prisoners, to which the misconduct of the parties might lead, would be justly regarded as a public calamity. It would be a fearful addition to the usual and inevitable distresses of war. Hence, this species of navigation requires, more than any other, to be scrupulously watched; nor is there any way, by which the necessary purity of conduct can be maintained, but by considering the owner as answerable for the due execution of the service, on which the vessel is employed. Cartel ships are under a double obligation not to engage in trade. The obligation exists in respect to both the belligerent powers, for both governments are equally bound not to permit this mode of intercourse to be abused to the purposes of a clandestine commerce, and an illicit gain. Every species of trade is, therefore, held to be strictly prohibited; nor, without the consent of both governments, are vessels, engaged in this service, permitted to take on board any goods whatever. When this prohibition is violated, the cartel-ship forfeits all her privileges, and becomes instantly liable to confiscation, not only in the prize courts of the enemy, but in those of the country to which she belongs.(a)

§ 58. The immunity from capture, in the case that has been stated, proceeds wholly from the law of nations; but the same protection may be exten-

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(a) *The Venus*, (4 Rob. 355.) *The Carolina*, (6 Rob. 336.)

ded in other cases, by the will of the sovereign power in the nation, to which the right of capture belongs. That branch of the government, to which, from the form of its constitution, the power of declaring war is entrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities that it sanctions, and may forego, wholly or partially, the exercise of its belligerent rights, in relation to any community or individuals, liable to be affected by their operation. This power of relaxing the laws of war, may be exercised by a general ordinance, by instructions to armed vessels, or by a special protection or authority granted to individuals ; and in whatever form the will of the government is expressed, all the courts sitting under its authority, the courts of prize, as well as those of common law, are bound to respect and obey it.

§ 59. The most usual form, in which the will of the government, that the property of an enemy shall be exempt from capture, is conveyed, is that of a license to a particular individual, or individuals, to transport certain goods, or engage in a specified trade. Such licenses are frequently granted, not only for the protection of an enemy, but to authorize subjects in trading with the enemy, and the cases relative to their legal construction and effect, are numerous, both in the reports of the admiralty, and of the courts of common law. As the principles and rules, however, to be extracted from these decisions, are equally applicable to both forms of the license, I shall defer the consideration of the subject, that the whole may be treated in connexion, and be embraced in one view. It is proper, though scarcely necessary to add, that, where a voyage or



## PROOFS AND ILLUSTRATIONS.

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### NOTE I.

P. 510, § 20. In *McConnell v. Hector*, (3 Bos. & Pull. 113,) the question was, whether a commission of bankruptcy could be sustained, that was founded on the petition of a party, who stated that the debt was due to himself and his partners, who were British subjects; but, who at the time were residing and carrying on trade at Flushing, a port belonging to the enemies of Great Britain. The court were of opinion that those partners were to be considered as alien enemies, and consequently, that as no action for the debt could be maintained in their name, a petition, of which the object was the recovery of the debt, by means of a commission of bankruptcy, was just as illegal, and the commission, therefore, void. Lord Alvanley, Ch. J., delivered the following opinion:—"Most certainly, every natural born subject of England has a right to the King's protection, so long as he entitles himself to it by his conduct; but if he live in an enemy's country, he forfeits that right. Though these persons may not have done that which would amount to treason; yet there is an hostile adherence, and a commercial adherence; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of an hostile state, and who is so far a merchant settled in that state that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled to sue as an English subject in an English court of justice. The question is, whether a man who resides under the allegiance and protection of an hostile state for all commercial purposes, is not to be considered to all civil purposes, as much an alien

enemy as if he were born there? If we were to hold that he was not, we must contradict all the modern authorities upon this subject. That an Englishman, from whom France derives all the benefit which can be derived from a natural born subject of France, should be entitled to more rights than a native Frenchman, would be a monstrous proposition. While the Englishman resides in the hostile country, he is a subject of that country, and it has been held that he is entitled to all the privileges of a neutral country while resident in a neutral country." Rooke, J., said,—“The reason of the disability of a person residing in an enemy's country, is, that the fruits of the action may not be remitted to an hostile country, and so furnish resources against this country. For that purpose, the case of an Englishman residing abroad does not differ from that of any other person. I am of opinion, therefore, that the petitioning creditor could not have maintained an action in this country for that debt, which is the foundation of the commission, and consequently that the commission cannot be supported.”

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NOTE II.

P. 516, § 27. In the case of the *Indian Chief*, Mr. Johnson, one of the claimants, was an American citizen in his native character; but had resided, and was engaged in trade in England, and was still living there when the ship which he claimed as owner, and which was seized as engaged in a trade with the enemy, commenced her voyage. Sir William Scott said he had no doubt, that Mr. Johnson was to be considered a British merchant at the time of the sailing of the vessel, and added, “nor can there be any doubt that if Mr. Johnson had continued where he was at the time of sailing, if he had remained resident in England, it must be considered a British transaction, and therefore a criminal transaction, on the common principle that it is illegal in any person owning an allegiance, though temporary, to trade with the public enemy.” But as it was clearly proved that before the seizure Mr. Johnson had left England for the United States, and with the *bona fide* intention of resuming his

native character, his claim was allowed, and the ship restored. (3 *Rob.* 18, 19, 20, 21.)

In the case of the *Etrusco*, decided by the Lords of Appeal in 1798, the claimant was a Swiss by birth, but had been impressed with a French hostile character, by trading under the protection of a French factory in China, and such was his character when the goods were shipped; but he had fortunately quitted China before the capture, and upon this ground a restoration was decreed.

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NOTE III.

P. 521, § 34. Vattel, (*liv.* 1, *ch.* 19, § 220—223,) while he asserts the general right of a subject to transfer his allegiance, explicitly denies that the right can be justly exercised during a war in which his country is involved. His desertion of his country, at such a time, he considers as an act of positive criminality.

Bynkershoek, who asserts the right of expatriation in the broadest sense of the term, yet seems to confine its exercise to a time of peace. It must, however, be admitted that his language is by no means so explicit as that of Vattel. (*Bynker. Q. I. P. & P., lib.* 1, *ch.* 22.) Vattel is fully supported by Grotius and Puffendorf in the passages to which the text refers.

The right of a citizen to expatriate himself, that is, to divest himself *permanently* of his native allegiance, by emigrating to a foreign country, has several times been a subject of discussion in the Supreme Court of the United States; but neither the existence of the right, nor the limitations to which, upon the supposition that it exists, it is properly subject, have yet been authoritatively settled.

In the early case of *Talbot v. Janson*, (3 *Dallas*, 162—3,) Iredell, J., admits the general right of an American citizen to change his residence and allegiance; but denies that the right can be justly considered as inalienable and unlimited; on the contrary, he distinctly asserts that a man cannot expatriate himself in time of war, without the consent of the legislative power. In this case it was evidently

the opinion of all the judges, and may, therefore, be properly regarded as the judgment of the court, that even a neutral subject cannot expatriate himself for the purpose of engaging in the military service of a belligerent power, and in the long subsequent case of the *Santissima Trinidad*, (7 *Wheat.* 264,) the same doctrine was explicitly maintained. In the latter case, Ch. J. Marshall, in delivering the judgment of the court, held this language:—"Assuming, for the purpose of argument, that an American citizen may, independently of a legislative act to this effect, throw off his own allegiance to his native country, *as to which we give no opinion*, it is perfectly clear that this cannot be done without a *bona fide* change of domicil. It can never be asserted, as a cover for fraud, or as a justification for the commission of a crime against his country, or for a violation of its laws, when this appears to be the intention of the act." If it be a crime in a citizen to desert his country in a time of war, this language goes the full length of the doctrine asserted in the text.

In the case of the *Dos Hermanos*, (2 *Wheat.* 76,) which arose during the last war between Great Britain and the United States, the propriety of a condemnation depended solely on the question of the domicil at the neutral port of Carthage, of the claimant, Mr. Green, a native citizen, who, it appeared in evidence, had during the war returned to the United States, and had become the owner of a privateer at New-Orleans. In reference to these facts, Mr. J. Story, in delivering the judgment of the court, observed:—"In respect to the domicil of Mr. Green, there is certainly much reason to doubt if it would be sufficient to protect him even if he could show himself at the time of the capture a citizen of Carthage. For, if upon his return to New-Orleans, after the war, he acquired a domicil there, (of which the circumstance of his becoming the owner of a privateer at that port affords a strong presumption,) he became a re-integrated American citizen, and he could not by an emigration afterwards, *flagrante bello*, acquire a neutral character, so as to separate himself from that of his native country." (2 *Wheat.* p. 98.)

Chancellor Kent, (1 *Com.*, 5th ed. 76,) evidently refers to this case as an express decision, and although the judgment

of the court did not exactly turn on this point, yet, as the opinion of Mr. J. Story was delivered in behalf of all the judges, it carries with it the weight of their united authority, and is, therefore, equivalent to a decision.

In the cases of *Duguet v. Rhineland*, (1 *Johns. Cases*, 360,) and of *Jackson v. N. Y. Ins. Co.*, (2 *Johns. Cases*, 191,) the principle, that no individual, either in regard to his own country, or its enemies, can expatriate himself, in a time of war, so as to destroy the relation in which he stood at the commencement of hostilities, was adopted by the Supreme Court of New-York as the basis of their judgment in favor of the underwriters. In the first of these cases the property insured had been condemned, on the same ground, in the British Vice Admiralty Court at New-Providence, and this condemnation is at least presumptive evidence that such is the established doctrine of the Admiralty in England.

The judgment of the Supreme Court in *Duguet v. Rhineland*, was afterwards reversed by the Court of Errors, (2 *Johns. Cases*, 476. *S. C. 1 Caines' Cases in Error*, xxx.) upon the ground that there is no such principle in the law of nations as had been asserted; but that the right of emigration, unless restrained by some positive act of the government, exists as fully in time of war as of peace. But this decision of the Court of Errors, if repugnant to the law of nations, or to the authority of the federal courts, for reasons already given, (*Sup.*, *Lec. IV.*; *Note III.*, p. 479,) is not evidence of the existing law even of New-York.

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NOTE IV.

P. 530; § 48. *Barker v. Blakes*, (9 *East*. 283.) The insurance in this case was on a quantity of oil on board an American ship on a voyage from New-York to Havana. The assured was an American citizen, resident in the United States. The ship, in the course of the voyage, was captured by a British privateer, and carried into the port of Bristol. The ship and cargo were libelled by the captors in the court of admiralty; but a small portion only of the cargo was condemned



as enemies' property, the ship and the oil being restored as neutral. The plaintiff, however, by the sentence of the Court of Admiralty, was subjected to the loss of freight and of expenses, and the detention of the ship occasioned, in the result, a total loss of the voyage, as to the oil, which, by agreement of the parties, and without prejudice to their rights, was sold in England, and produced a sum much below the prime cost. The plaintiff claimed the whole of his actual loss; but, it was admitted, was not entitled to recover that portion of it which arose from the sale of the oil, unless he had abandoned as for a total loss in due season. The court decided, that the loss sustained, was, in its nature, total; but that the assured was precluded from its recovery, as such, by his failure in giving notice of an abandonment, within that reasonable time, which the law requires. The judgment of the court was, therefore, limited to the average loss, which the plaintiff had sustained, of the freight and expenses adjudged by the Court of Admiralty. On the general question of the right of the assured to recover, Lord Ellenborough, in delivering the judgment of the court, made these observations. "The defendant contends, that the plaintiff cannot, by law, recover at all, even to the extent of the average loss of his freight and expenses under this policy; and that to allow of such a recovery would be to allow of an indemnity being afforded, through the medium of a British insurance, to neutrals, acting in contravention of the interests and policy of Great Britain, in the carrying of the goods of its enemies. That, in so doing, the neutral had, in effect, violated the duties of his neutrality, and assumed a hostile character in respect to this country. But it does not appear to us that this general objection to the plaintiff's right to recover, is well founded. The American was at liberty to pursue his commerce with France, and to be the carrier of goods for French subjects; at the risk, indeed, of having his voyage interrupted by the goods being seized; or of the vessel itself, on board of which they were, being detained, or brought into British ports, for the purpose of search; but the mere act of carrying such enemies' goods on board his vessel constituted no violation of neutrality on the part of the American; nor did the arrest and detention of his vessel, for the purpose of search, and eventual con-

demnation of the goods, which might be found on board belonging to the enemy, form any breach of our duty, towards the American. The indemnity sought under the policy, in this case, is not an indemnity to an enemy, or to a neutral forfeiting his neutrality by an act, hostilely done by him against the interests of Great Britain; but an indemnity to a neutral, as such, against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights; and as innocently and allowably, to a certain degree, controlled and interrupted, on our part, in the exercise of our rights, as belligerents, against enemies' property found on board the ship of a neutral. These rights, though they are, in a degree, adverse to each other, do not, therefore, in the exercise of them, necessarily place either party in the situation of an enemy to the other. The various competitions for commercial advantage and superiority, which take place, between different nations; their mutual exclusions of each other, by their respective municipal regulations, are so many acts of adverse policy and conflicting rights, exercised towards each other; but they occur, without producing any breach of national amity. And it has never yet, in any instance that I am aware of, been held a breach of implied duty, in the subjects of either state, to lend their assistance, by insurance or otherwise, to such rival or exclusive commerce or interests of the other. Cases of express public prohibition, and that degree of assistance to enemies which constitutes a society in war against any particular state, fall, of course, under a different consideration, and are necessarily to be understood as interdicted subjects of insurance in every country to which this species of contract is known. The voyage and commerce, therefore, in the course of which the vessel carrying the goods insured was, in this case, engaged, not being either of a hostile description, nor in any other way, expressly or impliedly forbidden by the law or policy of this country, the general objection to the plaintiff's recovering at all under this policy of assurance, falls to the ground."

It is not to be denied that the language of Lord Ellenborough in this opinion, understood in its literal extent, would sustain the validity of an insurance upon a neutral ship employed in the transportation of enemies' goods; but

as the question was not raised by the case, nor brought directly under the consideration of the court, it cannot be said to have been decided.

In the case of *Visger v. Prescott*, it was held by Lord Ellenborough that the underwriter was answerable even for a total loss on neutral goods, resulting from a British capture, although the court of prize, in directing the restoration of their proceeds, had determined that there was a just cause of seizure. (5 *Espin.* 184.)

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NOTE V.

P. 535, § 51. It is stated by Mr. Wheaton that in addition to the certificate of registry, which is the proof naturally to be looked for of the national character of the ship, the following proofs of property in vessel and cargo are usually required :—

“1st. The Passport, or Sea Letter. This is a permission from the neutral state to the master of the vessel to proceed on the intended voyage, and usually contains his name and residence, the name, description, and destination of the vessel, with such other matter as the local law and practice require. According to those treaties which determine the character of the goods by that of the vessel on board of which they are laden, and consequently that free ships shall make free goods; this is the only document or proof of property required. So also by the treaties between different maritime nations, and Turkey and the Barbary powers, it is stipulated that the production of a pass from the government whose flag the vessel bears, shall be conclusive evidence of the property, and shall exempt the vessel and cargo from further search and detention.

“2d. The Muster Roll, or *Rôle d'Equipage*, contains the names, ages, quality, and national character of every person of the ship's company.

“3d. The Charter Party; if the vessel has been let to hire.

“4th. The Bills of Lading, by which the master acknowledges the receipt of the goods specified therein, and pro-

mises to deliver them to the consignee or his order. Of these, there are usually several duplicates ; of which, one is delivered to the master, one retained by the shipper of the goods, and one sent to the consignees.

" 5th. The Invoices, which contain the particulars and prices of each parcel of the goods, with a statement of the charges thereon, which are usually transmitted from the shipper to the consignees.

" 6th. The Log-book, or Ship's Journal, which contains an accurate account of the vessel's course, with a short history of the occurrences during the voyage.

" As the whole of these papers may be fabricated, their presence does not necessarily imply a fair case ; neither does the absence of any of them furnish a conclusive ground of condemnation, as has been most unjustly provided by the ordinances of certain belligerent powers. As they furnish presumptive evidence only of the property in the vessel, and cargo belonging to those to whom it purports to belong ; so, on the other hand, their absence affords only presumptive evidence of the existence of enemy interests, which may be rebutted by other proof of a positive nature, accounting for the want of them, and supplying their place, according to the circumstances of each particular case." (*Wheat. on Cap.* p. 65, 66.)



## ILLEGAL INSURANCES.

## TRADE WITH THE ENEMY.

### LECTURE VI.

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*Of the liability to capture of the property of the subjects of the belligerent state, and of its allies.*

§ 1. The property of a subject is, in all cases, liable to confiscation in a court of prize, when it is found engaged in an unlawful trade or intercourse, with the ports, territories, or subjects of the public enemy; and the property of a subject of a state

allied in the war, is liable, under the like circumstances, to the same penalty.

It may now be stated, as a fundamental proposition, that in war, all intercourse between the subjects and citizens of the belligerent countries, is illegal, unless sanctioned by the authority of the government, or in the mere exercise of the rights of humanity. The interdiction is not limited to a commercial intercourse, although such is the form in which the proposition is laid down by many of the elementary writers, and, in some cases, by the judges. It extends to every species of communication, direct or indirect ; and considering the question upon principle alone, although the authorities are full and decisive, this general prohibition seems a necessary result of a state of war. A war places every subject or citizen in hostility to the adverse party. Each individual is bound by his personal efforts to assist his own government, and to counteract the measures of the enemy. Hence, every mode of intercourse with the public enemy, whether by personal communication, correspondence, or otherwise, that can possibly tend to relieve him from the pressure of hostilities, or aid him in the prosecution of the war, is a violation of duty, and is strictly interdicted. The interdiction of a trading with the enemy is not founded on any peculiar criminality, in the intentions of the party, or on the direct loss, or injury that must certainly result to the state. It springs from a more enlarged policy. It looks to the protection of the general interests and welfare of the nation, which the merchant, under the temptations of an unlimited intercourse, by artifice or fraud, or from motives of cupidity, may be led to sacrifice ; and the danger of such a sacri-



vice equally exists, in all cases, where the intercourse, whatever may be its particular form, is unrestricted by the authority of the government. (a) There are, doubtless, occasions on which an intercourse with the enemy, by commerce, or otherwise, may be highly expedient ; but it is not for individuals to determine on the existence of such occasions, from their own notions of expediency, and, probably, with views of private advantage, not easy to be reconciled with the general interests of the state. It is for the state alone, on more enlarged views of public policy, and on consideration of all the circumstances that may be connected with the intercourse, to determine, when it shall be permitted, and under what regulations. Hence, in the judgment of Sir Wm. Scott, no principle ought to be held more sacred, than that an intercourse with the enemy ought not to be allowed to subsist, on any other footing, than that of the direct permission of the state. (b)

§ 2. In treating this important subject, I shall first consider the cases, in which the property has been held subject to confiscation, on the ground of a trading with the enemy, and shall proceed, in order, to a separate consideration of those, in which the penalty has been applied to an intercourse of a different character.

§ 3. It will be seen, from the cases to which I shall refer, that the rule which prohibits every form of commercial intercourse, or trading with the ene-

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(a) Opinion of Mr. J. Story, in the *Julia*, (1 *Gallis*, 601—3 ; ) of Sir Wm. Scott, in the *Jonge Pieter*, (4 *Rob.* 79.)

(b) Opinion of Sir Wm. Scott, in the *Hoop*, (1 *Rob.* 199, 200.) The remarks of the judge are limited, in terms to a trading with the enemy, but, in principle, they embrace all cases.

my, is enforced in the courts of prize, with a stern, and inflexible rigor. No motives of compassion or indulgence, prompted by the hardship of the particular case, nor any views of public utility, derived from the innocent, or beneficial nature, of the particular traffic, are ever allowed to suspend or mitigate its application. Such considerations are not regarded as legal distinctions, that can operate to create an exception from the general rule. They may influence properly the discretion of the executive power, but must be rejected by the judicial conscience.(a)

§ 4. Although the language of Lord Mansfield,(b) on one or two occasions, implies an opposite doctrine, it is certainly not necessary, in order to constitute a trading with the enemy, that the ship, in which the goods, engaged in the illegal traffic, are transported, should also belong to a subject of the belligerent state, whose rights are violated. The vessel may be neutral, but the neutrality of the flag, where the traffic is thus illegal, affords no more protection to the goods of a subject, than in all circumstances, to those of an enemy. It is by the intervention of neutrals, that the trade of subjects with the enemy is usually conducted, and such appears to have been the national character of the ship in most of the cases, in which a condemnation has been pronounced.(c)

§ 5. It does not distinctly appear, in what light

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(a) Sir Wm. Scott, in the *Hoop*, (1 *Rob.* 217,) and Mr. J. Story, in the *Joseph*, (1 *Gallis*, 549, 550.)

(b) In *Planché v. Fletcher*. and *Gist v. Mason*, sup. Lec. IV., Note II., p. 464.

(c) It was so in the *Hoop*, and in the *Ringende Jacob*, the *Lady Jane*, the *Deergarden*, and most of the other cases cited by Sir Wm. Scott, in giving his judgment. (1 *Rob.* 202.)

the conduct of a neutral ship, employed by subjects in a trade with the enemy, is regarded in the courts of prize. It is, indeed, evident, that the vessel, if not liable to any other noxious imputation, is, in all cases, restored ; but whether the owner and master are subject to any penalty, such as the loss of freight, I have not been able to discover. If their acts, in receiving the goods for such a purpose, are to be considered as a criminal departure from neutrality—and when the nature of the traffic is known to them, this view of their conduct seems not unreasonable—the penalty of a loss of the freight, as in the case of the transportation of contraband articles, may justly be inflicted ; and if such is the practical rule, an insurance on the ship, made in the belligerent country, whose rights are violated, would be, probably, invalid. Such, we have seen, is the rule, where any penalty, although not involving a confiscation of the property, is imposed by the municipal law ; and the analogy suggested by these cases, it seems reasonable to believe, would govern the decision.(a)

§ 6. To render the importation of goods, from an enemy's port, an illegal trading, it is not requisite that they should be the fruits of any purchase, barter, contract, or negotiation, in the enemies' country, after hostilities had commenced. The sailing of the vessel, with the goods on board, after the party had a knowledge of the war, completes the offence, stamps the cargo with an illegal character, and subjects it, during its transportation, to a rightful seizure. It is in vain to allege, that the goods were the produce of a shipment, made to the enemy's country, before hostilities were de-

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(a) *Sup. Lec. III., Note II., p. 377 a 387.*

clared ;(a) or were an investment of funds at that time in the enemies' country which the party had no other means of withdrawing ;(b) or that he had acquired his property in the specific goods before the war ;(c) or even that the goods were actually shipped, as well as purchased, before hostilities commenced ;(d) or that the ship in which the goods are found, although subsequently released, was originally carried, by force, into an enemy's port ; since, although her detention was compulsory, the traffic, by which she obtained her cargo, was voluntary.(e) None of these defences meet the allegation, that the attempt to import goods from the enemy country, without the license of his own government, is a violation of duty on the part of the subject, that, by law, involves his property so employed, in the penalty of confiscation. The propriety of a strict adherence to this doctrine, is vindicated by Mr. J. Story, with his usual ability. In his judgment, it would be dangerous, in the extreme, to allow individuals, under the cover of a right to withdraw their property, acquired before the war, to import all property, from the enemy's country, which the ingenuity or fraud of the party, might clothe with the *insignia* of his own possessions ; while, on the other hand, there is no inconvenience

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(a) *The Lady Jane*, (cited 1 *Rob.* 202.)

(b) *Potts v. Bell*, (8 *Term*, 548.) *The William*, (cited 1 *Rob.* 214.) *The Rapid*, (1 *Gallis*, 295.)

(c) *The Juffrow Louisa Margaretha*, (cited 1 *Rob.* 203.) S. C., (1 *Bos. & Pull.* 349, note.) *The Rapid*, ut sup., S. C. affirmed in error, (9 *Cranch*, 132.) *The St. Philip*, (cited 8 *Term*, 556.)

(d) *The Eenigheid*, (cited 1 *Rob.* 210.) *The Fortuna*, (*Ibid.* 211.) *The Mary*, (1 *Gallis*, 620.)

(e) *The Alexander*, (8 *Cranch*, 169.)

in allowing such rights to be exercised, under the eyes and the protection of the government; since it can never be presumed, that the public councils will refuse their aid to the preservation of the honest acquisitions of their own citizens.(a)

§ 7. It is true, that it was once decided by the Court of Common Pleas in England, that goods might be lawfully exported from an enemy's country, although purchased during the war, where the sole object of the purchase was to enable the parties to remit to their own country their funds and effects, which were in the enemy's country, when war was declared; but this exception, upon solemn argument, was subsequently overruled by the Court of King's Bench; and, by the reversal of the judgment of the Common Pleas, the general doctrine was firmly established, to the full extent, in which it has been stated.(b)

§ 8. The only exception, from the rule, that confiscates all goods imported from the enemy's country during the war, that can now be affirmed to exist, applies to goods that are shown to have been purchased, under an order given previous to the commencement of hostilities, and where it was not in the power of the owner, by any diligence, to countermand the order, in time to prevent the shipment. It was upon this ground, that Sir William Scott, in one case, decreed a restoration; and the propriety of allowing this reasonable exception is plainly implied in other decisions.(c)

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(a) *The Rapid*, opinion of Story, J., (1 *Gallis*, 305.)

(b) *Bell v. Gilson*, (1 *Bos. & Pull.* 345.) *Potts v. Bell*, (8 *Term*, 548.) *Sup. Lec. IV.*, Note II., (p. 467, 468.)

(c) *The Juffrow Catharina*, (5 *Rob.* 141.) *The Fortuna*, (1 *Rob.* 211.)

§ 9. Whether a similar exception ought not to be allowed in favor of a subject, who, finding himself in an enemy's country, on the breaking out of a war, immediately withdraws himself, with his property, and returns to his native country, is a question that I regard as still undetermined. It has already been stated, that the language of Sir William Scott, on several occasions, seems to justify the conclusion, that a distinction, in favor of persons thus circumstanced, would be admitted in the English admiralty; and that the propriety of its allowance is countenanced by the opinions of several of the most eminent writers on public law. Vattel and Burlamaqui concur in the doctrine, that both justice and humanity require that persons who are surprised by a war, in an enemy's country, should have a reasonable time to withdraw their persons and effects, and ought not to be treated as enemies, unless they suffer the period limited for their departure, to elapse, without availing themselves of the opportunity.(a) It seems a necessary deduction, from these views, that, in the judgment of these writers, the property of persons, thus withdrawing themselves from the enemy's country, would, in the course of transportation, be entitled to the protection of their own government; since, otherwise, the very object of the lenity exercised towards them might be defeated, and that, which

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The *Freeden*, (*ibid.* 212.) An exception was also allowed by Sir Wm. Scott, in the case of the *Madonna della Gracie*, (4 *Rob.* 195,) but the circumstances of this case were so peculiar, that it is difficult to extract from them any general rule. That which seems to me the principle of the decision, is stated in a succeeding section—§ 10.

(a) Vattel, liv. 2, ch. 18, § 344; liv. 3, ch. 4, § 63; ch. 5, § 73, 77. Burlamaqui, P. IV. Ch. VII. § 6. 2 *Wheat. Internat. Law*, 17, 18.

was granted as a favor, would be converted into a snare. If the peculiar hardship of confiscating the property of persons thus circumstanced, should induce, even the hostile government to relax, for their benefit, the ordinary rules of war, it is evident, that the same consideration addresses itself, still more directly and with greater power, to the justice of their own government. It would, indeed, be a strange assertion, that the very property, which the enemy is bound to release, their own government can be justified in seizing and condemning. Let it be admitted, that the doctrine in question is not an established rule of the law of nations, but merely a precept of morality, that appeals only to the humanity or discretion of the sovereign power: (a) let it be admitted, that the hostile government is not bound to permit the subjects of an enemy to withdraw themselves and their effects, at the commencement of a war, unless the obligation is created by the special provisions of a treaty: the very reply is a confession, that where the consent of the hostile government is given, the property of a subject, who avails himself of the privilege, is not involved, by its permitted transportation in an illegal trade; but, instead of being liable to the capture, is entitled to the protection, of his government. Hence, the question at once arises, can the right of the subject, to demand this protection, and the duty of the government to extend it, be properly made to depend on the previous consent and mere discretion of the hostile government? Whether that consent be given or withheld, is not the right of

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(a) Ch. J. Marshall in *Brown v. The United States*, (8 Cranch, 125.)

the subject, to return to the country that claims his allegiance, equally perfect? Whether the immediate return of a subject, thus absent, is a positive duty, it is unnecessary to determine, although the same reasons that forbid him to emigrate from his native country, during a war, seem to establish the duty of his return. That he has an *election* to return is undoubted; nor is it possible to deny, that the conduct of the individual, who anxious to resume his native allegiance, honestly endeavors to restore himself and his property to the just demand of his country, is entitled to high commendation; and if so, he has surely a right to expect, not merely the approbation, but the aid of his government, in the execution of his laudable purpose. To protect its subjects, who retain their allegiance, is the moral obligation that rests upon every government, and where the acts for which the protection is sought, are not merely innocent, but meritorious, the obligation presses with a peculiar force. To confiscate the property of subjects, in the act of returning to their allegiance, is the extreme of injustice, as well as of impolicy. It is to punish those, whom their country should desire to reward. It is to deter others from following their example. It is to dissolve, by violence, the ties that bind the citizen to his country; to quench the feelings of patriotism, and substitute those of aversion and hatred.(a)

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(a) It may seem, at first view, that the question discussed in this and the two succeeding sections, is the same that arose in the *Venus*—the arguments in relation to which, have already been fully given. (Sup. Lec. V., § 13, 14, 15, 16, pp. 503—508.) But, although they bear a close resemblance, the questions are not identical. That determined in the *Venus*, was, that the property of a citizen, domiciled in a foreign country,



§ 10. It may be said, that the observations hitherto made, only prove, that it is the duty of a government, where any of its subjects are detained in an enemy's country, to facilitate their return, by granting a license for the transportation of their property ; not that the subjects can be justified in shipping that property from an enemy's port, without the protection that a license affords. The propriety, therefore, of requiring a license, is the question next to be considered. It is, doubtless, right and necessary, that a merchant, not resident in an enemy's country, who desires, at the commencement of a war, to withdraw his property and effects, should obtain a license from his own government. He is guilty, otherwise, of a voluntary trading. The good faith of a person, who has the power to apply for a license, and neglects the duty, is liable to just suspicions ; and the express permission of the government is, in such cases, the only adequate security against abuse and fraud. But the propriety of requiring a person, who is seeking to escape from a hostile country, to continue a residence that exposes his person to imprisonment, and his property to seizure, until a license from his own government can be obtained, so far from being evident, can, by no means, be admitted. His ability to return—to save himself and his property—may de-

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when that country becomes involved in a war with that of his allegiance, is at once liable to be condemned as that of an enemy. The question now under consideration is, whether the property of a citizen, resident, but not domiciled, in the foreign country, if exported thence during a war with his own country, is liable, in all cases, to be condemned, not as that of an enemy, but as that of a citizen, engaged in an *unlawful trade with the enemy*.

pend upon measures, that, to be effectual, must be immediate ; and the necessary delay, in procuring a license, would operate, in most cases, to defeat the execution of his design. The production of a license, that it would be the certain duty of the sovereign power to grant, if applied for, but which the party, entitled to its benefit, by the necessity of his situation, was precluded from obtaining, can never be requisite. The sole value of a license, consists in the evidence that it furnishes of the will and consent of the government ; but the consent of the government to acts, to which its previous sanction, had it been possible to obtain it, must have been given, may, in all cases, be justly presumed. The very reasons that impose the duty of granting the license, dispense with its necessity. It was on this just and obvious principle, that Sir William Scott founded his decision, in a case where the special circumstances induced him to relax the general rule, and restore the property of the claimant. In his judgment, it would have been the duty of the government to have granted a license, which the party was unavoidably prevented from seeking ; and these circumstances, he regarded, as a virtual license, that superseded the necessity of an actual.(a)

§ 11. For the reasons that I have thus attempted to explain, I adopt the conclusion, that the property of subjects, withdrawing themselves, in good faith, from a hostile country, within a reasonable time

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(a) *The Madonna delle Gracie*, (4 *Rob.* 198.) The very words of the decision, are—"The circumstances of this case may be taken as virtually amounting to a license, inasmuch as if a license had been applied for, it must have been granted."

after knowledge of the war, is not stamped with the illegal character of a trading with the enemy ; but is to be considered by a just exception from the general rule, as exempt from confiscation. Such would be the probable decision of the question in the English courts of prize ; nor is it, by any means, certain, that an opposite determination would be made in those of the United States. The exact question has not yet been determined by the supreme tribunal ; nor is its decision involved as a necessary consequence in the cases that have hitherto occurred.(a)

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(a) In the case of *Amory v. M'Gregor*, (15 *Johns. R.* 24,) the Supreme Court of New-York determined that a citizen or subject of one belligerent may withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of war, and does not himself go to the enemy's country, for that purpose. Ch. J. Thompson, in delivering the opinion of the court, in this case, examines all the decisions in the Supreme Court of the United States, that had been relied on as establishing an opposite doctrine, and arrives at the conclusion that the question had never been decided by that high tribunal ; and he added, that from the guarded and cautious manner in which that court had reserved itself upon this particular question, there was reason to conclude, that when it should be distinctly presented, it would be considered as not coming within the policy of the rule that renders all trading or intercourse with the enemy, illegal. The last case in which the question arose in the Supreme Court of the United States, is that of the *St. Lawrence*, (9 *Cranch*, 121,) and in this Mr. J. Story, who gave the opinion of the court, said, that it was not the intention of the court to express any opinion as to the right of an American citizen, on the breaking out of hostilities, to withdraw his property purchased before the war from an enemy country ; but that, admitting the right to exist, it was necessary that it should be exercised with due diligence, and within a reasonable time after the knowledge of hostilities. In this case, the property was condemned ; but, on the express ground that the shipment had not been made until more than eleven months had elapsed after war was declared, the judges being all of opinion that it was then too late for the party to make the shipment so as to exempt him from the penalty attached to an illegal traffic with the enemy. It must, however, be confessed, that the language of the same eminent judge, in two cases, (*The Rapid*, 1 *Gallis*, 304, and *The Mary*, *Ibid.* 621,) amounts to a clear denial of the existence of the right in question, un-

§ 12. The good faith of the parties, the entire absence of any intention to violate the law, is no defence to the charge of an illegal trade with the enemy, and affords no protection to the ship or goods engaged in the traffic. Where the fact of an actual contravention of the law, is established, no innocence of intent, however perfect, can avert the legal penalty. In the celebrated case of the *Hoop*, the goods libelled were imported from an enemy's country, with the express sanction of the commissioners of the customs in Ireland, who founded their opinion of the legality of the trade, on the special provisions of an act of parliament; but as the construction which they gave to these provisions was, in the judgment of Sir Wm. Scott, wholly erroneous, he felt himself constrained, while he admitted and lamented the hardship of the case, to pronounce a condemnation.<sup>(a)</sup> To show the necessity, under which he acted, and that he was only following the established law of the court, he referred to many prior cases before the Lords of Appeal, and he concluded his review of these cases, by stating in these words, the substance and

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der any circumstances, and it is for this reason that a fuller discussion of the subject than could otherwise have been excused, has been deemed necessary. It is said, by Mr. Phillips, that "there are not wanting authorities to show that citizens, having property abroad at the breaking out of a war, may have it brought home, without thereby exposing it to forfeiture," (1 *Phil.* 84.) But, in both the cases to which he refers, (*The Frances*, 8 *Cranch*, 335, and the *Merrimack*, *Ib.* 317,) the goods were purchased and shipped before the war was known in England; nor was it possible for the American consignees to have countermanded, in time, the execution of their orders. Both cases, therefore, fall within the exception established by Sir William Scott in the *Juffrow Catherina*, (5 *Rob.* 141.) Although it must be admitted, that the exception is not distinctly noticed by the court.

(a) *The Hoop*, (1 *Rob.* 196.)

effect of the decisions : ‘ The cases that I have produced prove, that the rule has been rigidly enforced, —where acts of parliament have on different occasions been made to relax the navigation law, or other revenue acts ;(a) where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy’s possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence ;(b) that it has been enforced, when strong claims, not merely of convenience, but almost of necessity, excused it on behalf of the individual ;(c) that it has been enforced when cargoes have been laden before the war ; but where the parties have not used all possible diligence to countermand the voyage, after the first notice of hostilities ;(d) and that it has been enforced, not only against the subjects of the crown, but likewise against those of its allies in the war,(e) upon the supposition, that the rule was founded on a strong and universal principle, which allied states, in war, had a right to notice, and apply mutually to each other’s subjects.”(f)

§ 13. To render a trade with the enemy unlawful, it is not necessary, that the communication, with the enemy’s country, should be immediate and

(a) *The Compte de Wohronzoff*, (1 *Rob.* 205.) *The Expedite Van Rotterdam*, (*Ib.* 206.)

(b) *The Bella Guidita*, (1 *Rob.* 207.)

(c) *The William*, (*Ib.* 214.)

(d) *The Fortuna*, and *the Freedon*, (*Ib.* 211, 212.)

(e) *The Eenigheid*, (*Ib.* 210.)

(f) *The Hoop*, (1 *Rob.* 216.) Vide, also, *the Joseph*, (1 *Gall.* 545.) S. C., (8 *Cranch*, 451.)

direct. A circuitous trade is liable to the same abuses, and involves the same political dangers as a direct, and, therefore, equally falls within the interdiction and penalty of the law. Although the ship, in which the goods are embarked, is destined to a neutral port, where the goods are to be unladen, yet, if they are to be transported thence, whatever may be the mode of conveyance, to an enemy's port or territory, their ulterior destination determines the character of the trade, which is not at all varied by the interposition of the neutral port. In every such case, the outward voyage is illegal at its inception, and the goods shipped, are liable to seizure at the instant it commences. The converse of this proposition, where the goods are brought from an enemy's country, through a neutral territory, and are shipped from a neutral port, does not appear to have been decided ; but as there is no distinction in principle between the cases, the same rule would, doubtless, govern the decision.(a)

§ 14. Still less, is it necessary, in order to render the intercourse of a subject with the enemy an illegal trading, that it should be carried on by a communication between the ports of the belligerent country, to which the subject belongs, or neutral ports, and those of the enemy. If the trade in which he has engaged, with a knowledge of the war, is limited to the ports of the enemy, is a coasting or colonial trade, so far from meriting indulgence, it bears a character peculiarly noxious, and the ship and goods so employed, will be liable to instant condemnation. The conduct of the citizen, who thus incorporates himself with the commerce

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(a) *The Jonge Pieter*, (4 Rob. 79.) Opinion of Sir Wm. Scott, p. 84.  
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and interests of the enemy, admits of no palliation or excuse ; it is not simply blameable, but highly criminal.(a)

§ 15. A vessel, that has been engaged in a prohibited trade with the enemy, to be justly liable to condemnation, must, doubtless, be captured during the voyage in which the offence has been committed ; but, if that voyage, although consisting of separable parts, is continuous and entire, she is liable to capture, while any portion of it remains to be performed. An American ship, which sailed from the United States, on a voyage to Liverpool and the north of Europe, and thence, directly, or indirectly, to the United States, after her arrival at St. Petersburg, received news of the war between England and the United States ; but instead of returning home, by a direct voyage, she proceeded with a cargo on freight, to London, which she delivered, and was subsequently captured on her homeward voyage. Had she been captured while proceeding on freight from St. Petersburg to London, no question could have been raised as to the necessity of her condemnation ; but the counsel for the claimants contended, that the vessel, when taken, was no longer liable to capture ; that she had finished the offensive voyage, in which she had been engaged, by the delivery of her cargo at London, and that the voyage thence to the United States, was to be considered as new and distinct. The court, however, repelled these positions, as contradicted by the facts of the case.

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(a) *The Diana*, (2 *Gallis*, 98.) Vide, also, the *Lord Wellington*, where the cargo condemned was taken from an enemy's ship at sea, (3 *Gallis*, 102.)

They considered, that the voyage, as described, was entire, and that, even could it be admitted that the outward and homeward voyages might be separated, still, it was not to be denied, that the homeward voyage, which was to end in the United States, began at St. Petersburg, and that the continuity of this voyage could not be broken by the voluntary deviation of the master, for the purpose of an intermediate trade. In their judgment, the true character of the voyage in which the vessel was captured, was that of a voyage from St. Petersburg to the United States, by the way of London ; and, consequently, the vessel, if guilty of conduct for which she was subject to confiscation, as prize of war, was liable to seizure during any part of this circuitous, but entire voyage ; she was in *delicto*, until it was completed.(a)

§ 16. The mere intention to trade with the enemy, is not sufficient to constitute the crime, if, at the time of capture, the execution of the intent is no longer practicable. It is not meant, that an actual trading with the enemy is necessary to subject a ship or goods to confiscation, since, if they are engaged in a voyage with that design, and its execution at the time of capture is still practicable, the offence is complete, and its necessary penalty attaches. The exception applies only to cases where, from fortuitous circumstances, whether known or unknown to the parties, the execution of the design is no longer to be effected. A British ship, which was engaged in a voyage to an enemy's country—a West India island—was captured, after the island had, in fact, surrendered

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(a) The Joseph, (8 Cranch, 454-5.)



to the British forces, and on this ground, she was restored by Sir William Scott. He remarked, that, to justify a condemnation, there must be an act of trading, as well as the intention. Where the intent is to trade with an enemy, who, when the design is to be carried into effect, has ceased to be an enemy, the intention is no longer clothed with the facts that are necessary to convert it into a crime, and no case had been produced, in which, a mere intention to trade with the enemy country, contradicted by the fact of its not being an enemy's country at the time of capture, had enured to a condemnation. He intimated, however, that where the country to which a vessel is destined, is known to be hostile when the voyage is commenced, its commencement is a sufficient illegality; and he distinguished the particular case on the ground, that hostilities had not been declared, when the original voyage was begun.<sup>(a)</sup> Notwithstanding the distinction which is thus intimated, it is difficult to believe, that a ship, bound at the inception of her voyage, to a port, known to be hostile, would, on that ground alone, be deemed liable to condemnation, if the port, either by a capitulation, or the intervention of peace, had ceased to be that of an enemy at the time of her capture. The case is fully embraced within the principle of Sir William Scott's decision, and, it is believed, that this principle is not of limited, but of universal application. There is, probably, no exception from the rule, that a criminal intent is never punishable, if, before the design can be executed, the facts, upon

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(a) *The Abby*, (5 Rob. 251.)

which its *possible* execution depends, have ceased to exist.(a)

§ 17. Where the property seized as contaminated, by an illegal traffic with the enemy, is proved to belong to a house of trade, established in a neutral country, as a general rule, it is wholly restored; but if any one of the partners is shown to be a resident subject of the belligerent country, his share, notwithstanding the neutrality of the house, will be condemned; and this rule will be enforced, even where the belligerent partner is strictly dormant, and takes no part whatever in the direction and management of the affairs of the house. It is an established rule, that no person can be entitled to a restitution, who has any share or interest in a transaction, in which he could not lawfully engage as a sole trader.(b)

§ 18. We have seen that a court of prize regards, with an extreme jealousy, the transfer of ships from an enemy to a neutral during the war.(c) It views, with equal suspicion, and relies upon similar circumstances as *indicia* of fraud, when the transfer is from a subject to a neutral, and the ship is subsequently employed in a trade with the enemy. In a case where the ship, originally British, was asserted to have been sold, after hostilities between England and Holland had commenced, to the neutral claimant, as it appeared that she continued under the control and management of her former master, who had also been the owner, and was employed by him in an exclusive trade between

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(a) *Infra*, (Lec. VII., § 9.) *The Imina*, (3 *Rob.* 167.) *The Lisette*, (6 *Rob.* 387.) *The Trende Sostre*, (6 *Rob.* 390, in *notia*.)

(b) *The Franklin*, (6 *Rob.* 127.)

(c) *Sup. Lec.* IV. § 46, 47, p. 446-7-8.

Guernsey and Amsterdam, and had not even visited the port where the pretended owner resided, it was held by Sir William Scott, that the transfer was plainly colorable and void ; and he condemned both ship and cargo as involved in the same transaction. In this case a regular title by a bill of sale was produced and relied on ; but, as it contained a stipulation that the former master should retain the command, so far from fortifying the claim, it strengthened the conclusion of a fraudulent intent.(a)

§ 19. In another case, where the ship, during the war, had been ostensibly transferred by a British to a Danish and neutral subject, the meditated fraud, which Sir William Scott traced and unravelled with surpassing skill, was sought to be disguised by the regularity and completeness of the paper documents, and upon these the counsel for the claimant relied as conclusive evidence that the transaction was fair and genuine. In reply to the argument, Sir William Scott observed, that, where there is an intention to deceive, the regularity of the papers is a necessary part of the apparatus and machinery of the fraud ; consequently, if regular papers were alone a protection, the fraud, in most cases, would be undetected and unpunished. He was far from holding that regular documents are of no importance or avail ; on the contrary, if duly verified and supported, they are, in all cases, presumptive evidence, and, if unopposed, are conclusive ; but, if the circumstances and facts of the case lead justly to the conclusion that the papers, though formal in themselves, and formally supported by

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(a) *The Omnibus*, (6 Rob. 71.)

oath, are, notwithstanding, false, it would be absurd to say that the court is bound by them. Unquestionably, a court of admiralty should proceed with great caution, in determining against regular papers, regularly supported; but, if the papers say one thing, and the facts of the case another, the court must exercise a sober judgment, and determine, according to the ordinary rules of evidence, to which the preponderance is due. The learned judge then proceeded to extract the truth of the case from a mass of circumstantial evidence, and having thus demonstrated the falsity of the papers, he pronounced a condemnation of vessel and cargo.<sup>(a)</sup>

§ 20. The residence, or domicile of the claimant, has, in many cases, an important influence on the decision of the question, whether the property seized, as engaged in a trade with the enemy, is liable to confiscation. When the trading is from a port of the belligerent country, claiming the right of capture, and the adventure is there originated, the property, as a general rule, is undoubtedly liable to confiscation, if the owner, at the inception of the voyage, was a resident in the same country, whether as a native subject, a domiciled merchant, or a mere stranger, or sojourner. Even a stranger owes an obedience to the laws of the country in which he happens to be found, and the law that forbids an intercourse with the public enemy, is just as obligatory on him, as any municipal regulation of revenue and trade. The prohibition, from its nature, embraces all persons who are within the jurisdiction of the country

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(a) The *Odin*, opinion of Sir William Scott, (1 Rob. p. 252-3.) The property condemned, in this case, was of the value of £150,000 sterling.

by which it is declared, and may be rightfully enforced. Where a person, who is a neutral by birth, is not a mere sojourner, but has established his domicile in a belligerent country, all his property engaged in a trade with the enemy, whatever may be the nature of the voyage or trade, is just as liable to confiscation as that of a native subject. It was held by Sir William Scott, that a ship, under the American flag, and provided with all the documents necessary to prove her American character, but belonging to an American merchant, resident in England, could not be protected by the mere regularity of her papers, but that her fate must depend solely on the determination of the court, as to the national character of the owner; if, from the nature of his residence, he was to be regarded as a British merchant, a condemnation was inevitable.<sup>(a)</sup>

There exists, however, an important distinction, that has already been partially stated, between the case of a native subject, and that of a domiciled merchant, or casual visitor. The property of the subject, where the trade was illegal in its origin and intent, cannot be redeemed from its guilt and penalty by any subsequent change of his own residence; but that of the domiciled merchant, or stranger, will be restored, if, previous to its capture, he had, in fact, removed from the belligerent country, with the intention of returning to his own; for in this case, the illegality that arose solely from his local and temporary allegiance, by the removal of its cause, had ceased to exist.<sup>(b)</sup>

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(a) Sir W. Scott in *The Indian Chief*, (3 Rob. 17.)

(b) *Vide ante*, Lec. V., § 27, p. 516-17. Note 2, p. 544.

§ 21. I propose, as a question that merits consideration, whether the nature of the traffic may not, in some cases, justly subject the property to confiscation, as involved in a trade with the enemy, independent of the national character, or residence of the owner. Should a neutral merchant, resident in a neutral country, employ his ship in a constant trade between the ports of a belligerent country, and those of the enemy—as if an American merchant, during a war between England and France, should permit a vessel, owned by him, to be habitually and constantly employed in the transportation of goods between London and Havre, or Bordeaux—a trade so purely national, would, probably, impress its own character upon the master and the persons employed to conduct it, and the property of the principal be justly held to be bound by the character and acts of his agents. The same political reasons that forbid a subject to trade with the enemy, seem to apply, in their full extent, to a navigation and trade, such as has been described, and would, probably, induce a court of prize to pronounce them illegal, unless sanctioned by the express authority of the government.

§ 22. It has already been stated, that a subject, domiciled, as a merchant, in a neutral port, is clothed with the privileges of the country in which he resides; so that his property, engaged in a trade with the enemy, otherwise innocent, is exempt from confiscation.(a) It has never been decided that this exemption extends to all subjects who are resident, during a war, in a neutral country; but,

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(a) *Bell v. Reid*, (1 *M. & S.* 726.) *The Neptunus*, (6 *Rob.* 408.) *The Danous*, (4 *Rob.* 255, in notis.) *The Matchless*, (1 *Hagg. Ad. R.* 103.)

from the terms in which the decisions are expressed, it is, doubtless, limited to those, who, previous to the war, by the length or intent of their residence, and the nature of their occupations, had acquired a commercial *domicil*, in the full and legal sense of the term. A British subject, thus domiciled, is not, however, wholly released from the claims and duties of his native allegiance. It has been frequently decided in the English courts of prize, both in the admiralty and by the lords of appeal, that, although a British subject, resident abroad, may engage generally in trade with the enemy, he cannot carry on such a trade in articles of a contraband nature. The duties of his allegiance travel with him so far, as to restrain him from supplying, to the enemy, articles of this description.<sup>(a)</sup> As articles contraband of war, when destined to the use of the enemy, are liable to confiscation, even when the proprietor is a neutral, in his native character, the use and value of this distinction are not immediately obvious. Its probable application is to the ship employed as the vehicle of transportation. As a general rule, the ship, if belonging to a neutral, is restored. If belonging to a subject, domiciled abroad, by force of the distinction, she would probably be condemned. The deeper criminality, that the breach of his allegiance would fix upon the trade, would aggravate the penalty.

It is also to be observed, that this distinction is mainly founded on the doctrine of the English common law, that the allegiance of the subject is perpetual and unalienable. Hence, it could not, with propriety, be adopted, in its full extent, by the

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(a) *The Neptunus*, (6 Rob. 408.) *The Ann*, (1 Dod. 221.)

prize courts of a country in which the right of the citizen to divest himself, by a foreign residence, of his native allegiance, and all the duties that it imposes, is established by its municipal or constitutional law. In such a country, it could not be justly applied to a citizen, by whom this right of expatriation had been duly exercised. (a)

§ 23. It is now established, that where two or more powers are allied in a war, if the subjects of one are engaged in a trade with the common enemy, their property, so employed, is just as liable to confiscation in the prize court of an ally as in those of their own government. The trade, in such a case, is not simply a violation of the duty that the subject owes to his own sovereign. It is a violation of the compact by which all the powers are united in the prosecution of the war. It is a crime by which the rights and interests of all are affected, and hence the tribunals of all have an equal right to restrain and punish it. It is not alone in the prize courts of England, that this jurisdiction over the subjects of an ally, is claimed and exercised. It rests, according to Sir William Scott, on a universal principle in the law of nations; and Bynkershoek, while he admits that the jurisdiction is denied by some, on the ground that the obedience of the subject is due only to his own sovereign, and that a foreign power, although an ally, can have no right to control his actions, yet repudiates their

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(a) The absolute right of expatriation is maintained by many of the most eminent writers on the law of nations. It is so by Grotius, Puffendorf, Vattel, and Bynkershoek; but in the United States, it cannot be said that the doctrine is yet established, and it is, doubtless, to be received, if at all, with many limitations, which the writers on public law have failed to notice. *Vide ante* Lec. V., Note III., p. 545.



doctrine as contrary to reason, usage, and public utility.(a)

§ 24. It is an unsettled and doubtful question, whether the subject of a confederate power, whose property has been captured as engaged in a trade with the common enemy, can defend himself in the prize courts of an ally, by alleging that the trade was encouraged or permitted, by his own government. When the respective governments agree to unite in the war, they, in effect, agree that all intercourse between their respective subjects and the common enemy, shall be prohibited ; and this prohibition, it would seem, that neither government can be justified in relaxing, in favor of its own subjects, without the consent of its ally. While engaged in the prosecution of a common object, neither can be justified in acting with an exclusive regard to its own interests, on any subject, in which the rights of its ally are equally concerned. The observations of Sir William Scott, on this important question, are entitled to great weight, and, probably, by future judges, will be regarded as decisive.

It is of no importance to other nations, he observed, how much a *single belligerent* chooses to weaken and dilute his own rights ; but it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do any thing to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the

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(a) *The Nayade*, (4 Rob. 251.) *Bynkershoek Quæst. Jur. Pub. ch. 10*, (*Duponceau trans. p. 81.*) *The Eenigheid*, (1 Rob. 210.)

enemy, the consequence may be that it will supply that aid and comfort to the enemy, which may be very injurious to the prosecution of the common cause, and the interests of its ally. It should seem that it is not enough to say that the one state has allowed the practice to its own subjects ; it should appear to be, at least, desirable, that it could be shown that either the practice is of such a nature, as can, in no manner, interfere with the common operations, or that *it has the allowance of the confederate states.*(a)

In the case in which these observations were made, the property was condemned on other grounds. The question was, therefore, undecided ; nor does it appear to have subsequently arisen, either in the English courts, or in those of the United States.

§ 25. In closing this branch of our subject, it remains only to state the cases in which an intercourse with the enemy, although not a trading in the usual and proper sense of the term, is yet deemed to be equally criminal, and is followed by the same penal consequences.

§ 26. Should a ship, belonging to a subject, proceed to an enemy's port in ballast, with no intention of there procuring a cargo, it cannot be doubted, that she would be liable to capture, both on her outward and return voyage. It would be in vain to allege, that there was no act or intention of trading. It is plain, that there could be no justifiable motive for undertaking such a voyage, without the permission of the government ; and the presumption of concealed purposes of a commercial nature,

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(a) *The Neptunus*, (6 Rob. 406.)

and of a secret understanding with the enemy, could not be resisted.

So, where the goods of a subject are embarked in a neutral ship, which is first destined to an enemy's port, although it is not intended that the goods shall be there delivered, but that they shall proceed with the vessel to a neutral port, their ulterior destination, should they be captured in any stage of the circuitous voyage, would not protect them from confiscation.(a) In these cases, there are common grounds of condemnation. The property of a belligerent subject in an enemy's port, is liable to seizure by the hostile government, and the subject violates his duty by exposing it to this hazard. It is also evident, that this species of intercourse would open a channel for intelligence, and afford a cover for fraud, and hence it is forbidden by the same reasons of public policy that apply to an actual trade. It is a just observation of Sir William Scott, that a practice, which is liable to great abuse, though productive of no evil when fairly conducted, ought never to be allowed, if the abuse is certain to be frequent, and is impossible to be prevented. In such cases, the only safe rule is total prohibition.

§ 27. It has been decided by the court of highest authority in the United States, and is, therefore, to be regarded as established law, that if an American vessel, during a war, even when destined to a neutral port, prosecutes her voyage under a license from the government of the enemy, both ship and cargo, while they remain under the protection of the license, are liable to capture, and if captured, are lawfully subject to confiscation. This decision,

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(a) *The Vriendschap*, (4 Rob. 99-1.)

although novel in its form, is no more than a just and necessary application of principles universally admitted, and although no similar decision appears to have been made in the prize courts of England, it seems impossible to doubt that, should the case arise, the same reasoning would be adopted, and the same determination follow. (a) It is a presumption, not to be resisted, that the license is granted, by the hostile government, with the sole view to the furtherance of its own interests, and hence, the citizen or subject, who lends himself to the promotion of such an object, violates, from sordid motives, the plainest duties of his own allegiance.

§ 28. In the important case, in which the illegality of a voyage, under a license from the enemy, was first determined, the counsel for the claimant insisted, that there was no distinction between a license to individuals, and a general order or decree of the hostile government, authorizing and protecting all trade to a neutral country; but the argument met with no countenance from the learned judge who presided, and whose opinion in the court below, the Supreme Court of the United States, subsequently, in affirming his judgment, adopted *in extenso*, as a full and satisfactory expression of their own views. The cases supposed to be similar were, in his judgment, plainly distinguishable.

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(a) In *Everth v. Tunno*, (1 Bar. & Ald. 142,) the policy contained a warranty, that the ship should be provided with a French license, and the case turned upon the question, whether the terms of this license had been complied with. No question was raised as to the legality of the voyage, or the validity of the contract. It is, however, to be observed, that in this case, the ship was also provided with a British license. The assured, therefore, by accepting a French license, was not lending himself to the views of the enemy, but was merely gaining additional protection to a commerce that his own government desired to favor.

The first, the personal license, presupposes a personal communication with the enemy, and an avowed intention of furthering his objects; to the exclusion of the general trade, by other merchants to the same country. It has a direct tendency to prevent such general trade, and relieves the enemy from the necessity of resorting to a general order of protection. It contaminates the commercial enterprises of the favored individual with purposes not reconcilable with the general policy of his country, exposes him to extraordinary temptations to succor the enemy by intelligence, and separates him from the general character of his country, by clothing him with all the effective interests of a neutral. On the other hand, a general order opens the whole trade of the neutral country to every merchant; it presupposes no incorporation in enemy interests; it enables the whole mercantile enterprise of the country to engage in the traffic upon equal terms, and it separates no individual from the general national character. Hence, there is all the difference between the cases, that there is, between an active personal co-operation in the measures of the enemy, and the merely accidental aid afforded by the pursuit of a fair and legitimate commerce.

§ 29. Nor was it merely on the reasons that have been stated, that this enlightened judge founded his opinion. He proceeded to observe, that in every grant of a license, there is an implied agreement, that the party shall not employ it to the injury of the grantor—that he shall conduct himself in a perfectly neutral manner, and avoid every act of hostile tendency. Such an agreement results from the very nature of the engagement, and such

is the uniform construction put by Great Britain on the conduct of her own subjects trading under licenses. Can an American citizen, then, be permitted by his acceptance and use of a license, to carve out for himself a neutrality on the ocean when his country is at war? Can he justify himself in refusing to aid his countrymen who have fallen into the hands of the enemy on the ocean, or decline their rescue? Can he withdraw his personal services when the necessities of the nation require them? Can an engagement be legal, which imposes upon him the temptation or necessity of deeming his personal interests at variance with the legitimate objects of his own government? Are the principles of national law that formerly considered the lives and property of all enemies, as liable to the arbitrary disposal of their adversary, so far relaxed that a part of the people may claim to be at peace, while the residue are involved in all the dangers and calamities of war? He declared his inability to admit the doctrine, unless it was taught him by that superior tribunal, by whose superior wisdom he was willingly governed.(a)

The attempt would be presumptuous and vain to make any addition to reasons so conclusive in themselves, and so perspicuously stated. They are not to be regarded merely as evidence of the propriety, and wisdom of the rule, that has been adopted as law in the United States. They are a sound exposition, and an eloquent vindication, of the principles of that universal law of equity and reason, by which all civilized nations are equally bound.

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(a) *The Julia*, (1 *Gallis*, 605-6.) S. C., affirmed in Error, (8 *Cranch*, 181.)

§ 30. In a subsequent case, where, substantially, the same question arose, and in which the vessel was captured before her arrival at the port, where her licensed cargo was to be delivered, it was insisted, by the counsel for the claimant, that as no illicit intercourse had, in fact, taken place, the whole offence consisted in intention, and that, until the completion of the voyage, the party had the right and the power to abandon the illegal design, and there was no certainty that if the capture had not intervened, it would not have been abandoned. This reasoning, however, made no impression on the mind or decision of the court. They held that the vessel was liable to capture at the instant the voyage under the license was commenced, and that it was absurd to suppose, that the armed vessels of the United States were bound to abstain from a seizure, until it was known whether the illegal design would be completed or abandoned, since this would be, in effect, saying that the right of capture is only to exist when the power of making it was at an end.<sup>(a)</sup> This decision, it may not be unnecessary to remark, was only a particular application of a universal rule. The commission of the act, the execution of the contemplated design, is never necessary to justify a capture on a trading with the enemy. In all cases where the object of the voyage is prohibited, either by the municipal law, or the law of nations, its inception with the illegal intent, completes the offence to which the legal penalty attaches.

§ 31. In all the cases to which I have hitherto

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(a) *The Aurora*, (8 *Cranch*, 203.)

referred, the avowed or certain object of the license was to aid the design and further the interests of the enemy, by furnishing a supply of provisions to his armies in a neutral country, and in one of the cases much stress seems to have been laid on these circumstances as necessary to determine the illegality of the voyage ;(a) but, in the latest case on this subject, which it was attempted to distinguish on the ground that the licensed cargo was not, in fact, destined, in any manner, to the use of the enemy, the Supreme Court explained its former decisions, and placed the doctrine on the broad ground, that the mere sailing under an enemy's license, without regard to the objects of the voyage, or the port of destination, constitutes of itself an act of illegality which subjects the property to confiscation. It is an attempt, by one individual of a belligerent country, to clothe himself with a neutral character by the favor of the other belligerent, and thus to separate himself from the common character of his country.(b) It is indeed, evident, that the obligations which a hostile license imposes on the party to whom it is granted, are, in all cases, inconsistent with the duties of his allegiance, and hence its acceptance and use by the citizen, without the sanction of his own government, must, in all cases, be a sufficient ground of condemnation. It follows that an insurance upon property, covered by a license from the enemy, and liable to condemnation on that ground, if made in the belligerent country whose rights are

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(a) The language of the court, both in the *Aurora* and in the *Hiram*, (8 *Cranch*, 441.) S. C., (1 *Wheat*. 440,) seems to favor this construction.

(b) The *Ariadne*, (2 *Wheat*. 143.)



violated, is necessarily illegal and void ; but where goods are shipped, by a merchant, in a vessel, and on a voyage, which are protected by a license, if, at the time of the shipment, he had no knowledge of the existence and intended use of the license, they would, doubtless, be restored ; and, consequently, the insurance upon them would be valid.(a)

§ 32. In New-York the decisions of the Supreme Court, relative to the illegality of a voyage, protected by a license from the enemy, are in entire conformity to those of the Supreme Court of the United States, and in that state the illegality of an insurance on such a voyage is definitively settled.(b) It is proper here to remark, that in this, as in all similar cases, the charge of illegality can never be repelled by evidence of the knowledge and consent of the insurer. On the contrary, if the policy contains an express stipulation or warranty, that an enemy's license shall be used for the protection of the property on the voyage insured, the contract is, on its face, illegal and void.(c) The decisions in Massachusetts, it is to be regretted, do not correspond with those of the courts of the United States. It has been determined in that state, that the mere fact of sailing with a license, does not render the voyage illegal, so as to avoid the policy,(d) although it may subject the party to a penalty, and the property to confiscation ; and that the use of an enemy's license is so far from being unlawful, that the

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(a) It is plainly intimated by the court in the *Hiram*, (8 *Cranch*, 451,) that the goods of an innocent shipper would be restored.

(b) *Colquhoun v. N. Y. F. Ins. Co.* (15 *Johns.* 352. *Ogden v. Barker*, (18 *Johns.* 87.)

(c) *Craig v. U. S. Ins. Co.*, (1 *Pet. C. C. R.* 410.)

(d) *Hayward v. Blake*, (12 *Mass.* 176.) The same decision was made in Connecticut, *Bulkley v. Derby Fish. Co.*, (1 *Con.* 571.)

document has, in itself, a legal value, and is, therefore, a legitimate object of sale and of insurance. (a) Neither the opinions of the judges, nor the decisions, in these cases, I feel it a duty to remark, are to be considered as evidence of the existing law of Massachusetts. The questions to which they relate, form no part of the municipal law of the state. They belong exclusively to the national law of the union. Hence, the decisions in Massachusetts are superseded and overruled by the opposite decisions of that supreme tribunal, whose authority, on all questions of national law, is paramount and controlling. To deny that this authority, on such questions, is supreme, and, therefore, conclusive, on all state courts, as well as on the inferior courts of the United States, is virtually to dissolve the unity of the nation. Such a denial, by a state tribunal, would be a new and dangerous form of nullification. It would not be law, but a judicial menace of separation and anarchy. There is no political truth that deserves to be more frequently inculcated, and demands a more earnest belief, than that the decisions of the Supreme Court of the United States, on all questions of constitutional and national law, have the same obligatory force on all tribunals of justice, public functionaries, and private citizens, as the constitutional provisions of an act of Congress. In the broadest and fullest sense of the term, they are the law of the land. *This truth is the keystone of the national arch—its practical denial, the demolition of the structure.* (b)

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(a) Perkins v. N. Eng. Ins. Co., (12 Mass. 214.)

(b) Vide ante, Lec. IV., Note III., p. 478-9. The decisions of the Supreme

§ 33. The question of an unlawful trading with the enemy, may not unfrequently depend on the national character of the territory or port where the voyage commences, or to which it is directed. The prohibition of intercourse, doubtless, extends not only to every place within the dominions, and subject to the government, of the enemy, but to every place, of which the enemy is in the actual possession, although the possession may be so purely military and temporary, as not to have affected the national character of its inhabitants.(a) It is manifest, that the reasons of public policy that forbid the intercourse, apply as fully to the ports of an allied or friendly power, of which the enemy is in the transient occupation, as to those that properly belong to his dominions, in all cases where the fact of hostile occupation is known, when the communication is attempted. There is the same hazard to the state—the same breach of duty and allegiance, on the part of the subject.

§ 34. Nor is it always requisite to render the intercourse illegal, that the place, with which it is opened, should, at the time, be subject to the government, or in the actual possession of the enemy. When a territory, or colony, that is admitted to have formed a part of the dominions of the hostile power, is in a state of open and successful revolt; where

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Court of the United States were not cited in the *Massachusetts cases*—had they been, they would doubtless have been followed. In August, 1813, Congress passed a special act, prohibiting, under severe penalties, the use of British licenses, by American vessels; but the only value of the law consisted in its additional penalties. The insurance cases in the English reports of common law, relative to a trading with the enemy, have already been sufficiently stated. *Potts v. Bell*, (8 *Term*, 548.) *Atkinson v. Abbott*, (11 *East*, 135.) *Hagedorn v. Bell*, (1 *M. & S.* 450.)

(a) Vide ante, *Lec. IV.*, § 39, p. 438.

it has asserted its independence, as a sovereign state, and for years has maintained the declaration, by force of arms, courts of justice must still regard it as belonging to the enemy, until, by some public act of their own government, its character, as an independent and friendly power, has been expressly recognized. It is for the government alone to decide, whether a revolted territory has acquired the rights of an independent nation; and until that decision is made, the judges are bound to say, that its former relations are unaltered, and that the sovereign power of the parent state is still subsisting.

During the last war between England and France, it was decided by the lords of appeal, many years after the island of St. Domingo had thrown off its subjection to France, and large portions of it were in the actual and exclusive possession of the insurgents, that nothing had been declared or done by the British government, that could authorize a British tribunal to consider the island generally, or any parts of it, (notwithstanding a power, hostile to France, was established within it,) as any other than a colony, or parts of a colony, of the enemy. And in a case before the Supreme Court of the United States, in which a similar question, as to the national character of the island, arose, the doctrine that it could only be changed by the recognition of the American government, was explicitly and solemnly affirmed.(a)

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(a) *The Manilla*, (1 *Ed. Ad. R.* 3.) *The Pelican*, (*Ibid.* Appen. D.) *Rose v. Himely*, (4 *Cranch*, 272.) Vide also, *Gelston v. Hoyt*, (13 *Johns.* 587.) *Johnson v. Greaves*, (2 *Taunt.* 344.) *Blackburne v. Thompson*, (15 *East*, 81.) Mr. Phillips, (1 *Phil.* 82) says, that, in determining who are public enemies, regard is had to the government, *de facto*; and if a

§ 35. From what circumstances, and at what period, hostilities shall be said to have commenced, so as to have fixed the character of a public enemy, on the state with which they are waged, it is not, in all cases, easy to determine. There is no difficulty, where a public declaration or manifesto precedes an actual war. The war, then, exists from the time it is declared; but such a precedent declaration is not necessary to legalize hostilities, and by modern usage, it is frequently dispensed with, and the war commenced without any public notice or warning, by some acts of positive aggression, under the sanction and authority of the government. Such acts, however, are, in their nature, equivocal. They may be measures simply of precaution, or of limited reprisals.<sup>(a)</sup> It is the intention of the government by which they are directed, that alone determines their character. Where the intentions of the government are at all doubtful, it is evident, that the conduct of individuals is entitled to a lenient and favorable construction. To justify the condemnation of property, as involved in a trade with the enemy, or to avoid, on the same ground, a policy of insurance, the court should be satisfied,

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colony of the enemy has revolted, and maintains itself under an independent government, trade may be carried on with such colony; and in support of this position, he refers to the case of *Johnson v. Greaves*. The judgment of the common pleas, in this case, was evidently founded on the prior decision of Sir William Scott, in the *Manilla*; and it is manifest, that the exclusive grounds of his decision, as well as of the judgment of the King's Bench, in *Blackburne v. Thompson*, were, that, by the true construction of certain orders in council, the neutrality of all the ports in St. Domingo, not in the actual possession of French troops, had been recognized by the British government, and that it was only by virtue of this recognition that the trade was rendered legal.

(a) Vide an able article on *Marine Insurance*, in the *London Law Magazine*, Vol. XVIII., p. 92. 2 Wheat. on Inter. Law, 11.

not only that hostilities existed, but that the fact was so public and notorious, that the knowledge of its existence was justly to be imputed to the parties, by whom the acts of supposed illegality were committed or authorized. It would be plainly unjust, to confiscate the property or annul the contract, where reasonable doubts exist, either as to the intentions of the government, or the knowledge of the party.

§ 36. The period of the termination of hostilities seems, in all cases, to be free from doubt. They cease, from the time that the preliminaries of peace are signed, unless, as is usually the case, a different period is prescribed, and defined by the special provisions of the treaty. From the time that the war is thus terminated, the capture of enemy's property on the ocean becomes unlawful; and it seems the better opinion, that even where the capture is made in ignorance of the fact, the owner is entitled, not merely to a restitution, but to a compensation, in damages.<sup>(a)</sup> The effect, however, of the termination of hostilities, on the property of subjects, engaged in an unlawful trade with the enemy, is by no means manifest or certain. Where the vessel is destined to an enemy's port, the intervention of peace, before the completion of the voyage, it is probable, would redeem the property from confiscation; but where the voyage is from an enemy's port, as the offence was consummated by the act of sailing, there seems no reason to believe that the cessation of hostilities, during the voyage, would be held to discharge the crime, or avert its penalty.

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(a) 2 Wheat. Internat. Law, 291-2.

In neither of these cases, however, could the termination of the war render valid a prior insurance. In each case, the voyage is illegal at its commencement, and consequently, the contract void in its origin. It could not, therefore, avail, even to cover risks subsequent to the peace, that might otherwise be lawfully insured, without a new and express agreement of the parties.

§ 37. We have now reached that stage of the discussion, at which it is proper to inquire into the construction and effect of licenses granted by the sovereign power, either for the protection of a trade with the enemy, or of enemies' property.

In ascertaining the true result of the English decisions on this subject, there is a serious difficulty, that I have sensibly felt in examining the cases, and shall endeavor to explain. During the war between England and France, that followed the peace of Amiens, the courts of common law, as well as of prize, were led to adopt, from political motives, a much more enlarged and favorable construction of licenses, than had been usual in former wars. In former wars, a license was regarded as an act of special grace; and, as such, was subject, in its application, to the rules of a strict interpretation. An exact compliance with its terms and conditions was only dispensed with in cases of actual and proved necessity.(b) But on

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(b) In the *Cosmopolite*, (4 Rob. 11,) Sir Wm. Scott says—"Licenses, being high acts of sovereignty, they are necessarily *stricti juris*;" and in the *Goode Hoop*, (1 Ed. 328,) that "Licenses, being matter of special indulgence, the application of them was formerly *strictissimi juris*." So, in the *Juno*, (2 Rob. 117,) his language is—"A license is a thing *stricti juris*, a privilege which a man does not possess by his own right, but it is conceded to him as an indulgence; and therefore, it is to be strictly observed."

the renewal of the war, that the peace of Amiens rather suspended than terminated, when, by the overruling power and influence of France, the commerce of England was nearly excluded from the ports of the continent, the granting of licenses became a part of the settled policy of the English government, adopted with an express view to counteract and defeat the hostile designs of France. They were the expedient to which the government resorted, for the purpose of retaining a portion of the commerce, that the enemy aimed utterly to destroy.<sup>(a)</sup> The courts of justice, knowing that such were the views of the government, and that they were closely identified with the interests of the nation, were anxious to carry them into full effect. Hence, they adopted as a new principle of construction, that licenses were to be considered as granted, not from motives of personal favor, but from a regard to the general interests of the country. Consequently, where the intentions of the government, as to the nature of the trade that was meant to be protected, were substantially complied with, they regarded a departure from the literal conditions of the license with great indulgence, and for the protection of the parties gave to the terms of the instrument, the largest interpretation they could possibly admit. In a leading case

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(a) Vide the observations of Sir William Scott, in the *Goode Hoop*, (1 *Ed.* 329, 30, 31.) He says—"Although they are denominated licenses, they are, also, in effect, expedients adopted by this country to support its trade, in defiance of all those obstacles which are interposed by the enemy." Substantially the same views are expressed by Sir. J. Mansfield, in *Morgan v. Oswald*, (3 *Taunt.* 555,) and in *Flindt v. Scott*, (5 *Taunt.* 693,) where he says—"Licenses are now granted, not so much for the benefit of the grantee, as of the country; and contrary to what was at first held, they are to receive the most liberal construction."



the learned judge of the admiralty, after clearly explaining the reasons of public policy, that rendered it proper to relax the ancient strictness, laid down the following as the rule, by which, unless controlled by a higher authority, he meant in future to be governed, that, where the parties had acted with good faith, and with an anxious desire to conform to the terms of the license, he would have recourse to the utmost liberality of construction, that was in the power of the court to apply ; and, in such cases, would go to the utmost length of protection, that a fair judicial discretion would warrant, even when there had been a considerable failure in the literal execution of the terms of the license ;(a) and it is manifest that many of the decisions in the courts of common law, proceeded on the same principle. Most of the reported cases, on the subject of licenses, were decided during the period that this liberal doctrine prevailed, and in many of them, it is a matter of extreme difficulty to say, whether the determination was governed by the peculiar circumstances and character of the war, or by reasons of general and permanent application. It is evident, however, that it is only rules of a permanent character, that can justly be said to form a part of the existing law, and that it would be useless and improper to state those, that were, in truth, occasional exceptions, arising from a state of things so extraordinary, that it is highly improbable it will ever again occur. In the observations that follow,

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(a) *The Goode Hoop*, ut sup. In this case, the vessel did not begin her voyage until several months after the license had expired, yet the court presumed that the allegation, that she was detained by an embargo, was true.—That is, presumed the existence of a necessity that the party would formerly have been held strictly to prove.

I have endeavored to make the necessary discrimination, but will not affirm that I have fully succeeded.

§ 38. The validity of a license depends on the sufficiency of the authority, by which it is granted, and on the good faith of the party, on whose application it is issued. It must proceed, directly or indirectly, from the sovereign power of the state, which is alone competent to decide on all the circumstances of political and commercial expediency, by which such an exception, from the ordinary consequences of war, ought to be controlled.(a) In England, licenses are either granted directly by the crown, or by some subordinate officer, to whom the authority of the crown has been delegated, either by special instructions, or under the provisions of an act of Parliament; and, in all cases where the power is exercised by a subordinate officer, it is a proper and necessary inquiry, whether the terms of his authority, on a just interpretation of the intentions of the government, have been properly followed in the form and conditions of the license. Thus, where an act of Parliament requires that a license to authorize, during war, the importation of goods prohibited by the navigation acts, must specify the goods to be protected, the specification is indispensable, and a license containing only a general description, would be void on its face.(b) In the United States, as a general

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(a) Sir William Scott, in the *Cosmopolite*, (4 *Rob.* 11.)

(b) *Schroeder v. Vaux*, (15 *East*, 52.) Vide, also, *Vanharthals v. Halhed*, (1 *East*, 487, note.) *Kensington v. Inglis*, (8 *East*, 273.) *Johnson v. Sutton*, (*Doug.* 254) *The Hope*, (1 *Dod.* 226.) It was held, in this last case, that a license to cover enemies' property cannot be granted by a consul or admiral, and, in *The Charlotta*, (1 *Dod.* 387,) that even

rule, licenses can only be issued under the authority of an act of Congress, although, in special cases, and for purposes immediately connected with the prosecution of the war, such as the importation for the use of the government of naval or military stores, they may, probably, be granted by the sole authority of the president.<sup>(a)</sup> It is scarcely necessary to add that a license, although granted in due form, and by the proper authority, may be vitiated like every other grant, by the fraudulent conduct of the person obtaining it. His misrepresentation or suppression of material facts—of facts, that if known, would, probably, have influenced the discretion of the grantor—renders the license a nullity, and exposes the property, it is invoked to protect, to certain condemnation.<sup>(b)</sup>

§ 39. Where a license is valid when issued, two conditions are necessary to be fulfilled, to render it available for the protection of the property to which it relates. First—The intentions of the grantor, as expressed in the license, must be pursued in the mode of its execution. And second—In executing it, there must be an entire good faith on the part of the user. The good faith of the user is not alone sufficient. It is a mistake to suppose that his rights may not be prejudiced, by a construction of the grant, that is merely erroneous. It is absolutely essential, that the will of the grantor shall be observed; so that, that only shall be done which he intended to permit; whatever he did not mean to permit, is absolutely interdicted.

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the Lord Lieutenant of Ireland, without a special authority from the crown, has no power to protect, by a license, a trading with the enemy.

(a) Vide ante, p. 355.

(b) *The Clio*, (6 Rob. 69.) *The Cosmopolite*, at sup.

Hence, the party who uses the license, engages, not only for fair intentions, but for an accurate interpretation and execution of the grant. It is not meant, that licenses are to be construed with a literal and pedantic accuracy, so that the slightest deviation from their terms shall be held to vitiate their effect, but no greater latitude of interpretation is permitted than corresponds with the intentions of the grantor, fairly understood. No other or greater deviation is allowed, than it may be justly presumed the grantor, with a knowledge of the circumstances, would himself have sanctioned.(a)

§ 40. The most material circumstances, in respect to which it is necessary, that the intentions of the grantor, as collected from the license, shall be followed, are—1. The persons entitled to use the license. 2. The quality and quantity of the goods that it protects. 3. The character of the vessel. 4. The course and route of the voyage. And lastly, 5. The time limited for its performance.

§ 41. It seems to be clear, from the decisions, that a license is not a subject of transfer or assignment, but that its legitimate use is confined to those for whose benefit it was originally granted. However general may be the terms in which the grantees are described, those who claim for their property the protection of the license, must connect themselves with it, by proof that the application, on which it was issued, was made in their behalf, and that the applicant named in the license was, in truth, their agent.(b) But, where a license is

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(a) *The Cosmopolite*, ut sup.

(b) *Feize v. Thompson*, (1 *Taunt.* 122.) *Warin v. Scott*, (4 *Taunt.* 905.) *Robinson v. Morris*, (5 *Taunt.* 725.) *Barlow v. M'Intosh*, (12

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granting such a privilege, it is evident, that the government looks solely to the nature of the trade, and not at all to the character of the persons, by whom it is to be conducted. It is, accordingly, held, that it is of no consequence, by what individuals, such a license is carried into effect, provided, the conditions annexed to it are fully complied with. A license, thus general and indefinite, is a legitimate subject of transfer and sale, and the purchaser is as fully protected as if it had been granted to him on his personal application.(a)

§ 43. The grantee, when named, must be truly described in the license, and the privilege granted must be exercised by him, in the character which the license attributes to him. Where the agent, who procured the license, was described as a merchant of London, but it appeared on the trial, that when the privilege was granted, he was, in fact, a resident of a foreign country, the error was held to invalidate the license, and, as a necessary consequence, it avoided the insurance.(b) So, where a

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(a) *The Acteon*, (2 *Dod.* 48.) The negotiability of general licenses is also recognized in the *Louisa Charlotte*, (1 *Dod.* 308.)

(b) *Klingender v. Bond*, (14 *East*, 484.) Vide, also, *Warin v. Scott*, (4 *Taunt.* 605,) which corresponds, in principle, with the decision of the King's Bench. The authority of *Klingender v. Bond* seems to be much shaken by a decision, long subsequent, of the Court of Common Pleas, in the case of *Lemcke v. Vaughan*, (1 *Bing.* 473,) and, especially, by the observations made by Lord Gifford, C. J., in delivering the judgment of the court. In this latter case, it was held that exactly the same misdescription of the applicant and grantee, neither vitiated the license, nor affected the insurance. There is, however, this important distinction between the cases, that, in *Lemcke v. Vaughan*, the terms of the license did not require that the exportation it authorized, should be made by the grantees; but the conditions that it imposed were applicable, not to the person, but solely to the ship; and hence it was justly held that the object of the license was to legalize the commerce, without regard to the individuals engaged in it. Without relying, however, on this distinction, I regard the

license for importing goods from Holland, at that time an enemy's country, was granted to a person by name, describing him as a British merchant, it was held that, by visiting Holland in person, mixing and incorporating himself when there in the national commerce, and exporting the goods as a Dutch merchant, instead of importing them as an English, he forfeited the privilege he had obtained, and exposed his property to confiscation, as that of an enemy.(a) It is to be observed, that in neither of these cases was there any imputation or suspicion of fraud; but in each, the sole ground of the decision was, the impolicy and danger of allowing a departure from the terms of the license.

§ 44. Where the terms of the license require that the goods, to which it relates, shall belong to the person to whom it is granted, his property in the goods, absolute or special, is necessary to be proved, to render valid the license and legalize the insurance. It is not sufficient that it appears that the goods were consigned to him by a general bill of lading, where he had in fact no personal interest, and they were not meant to be delivered to him, but, by particular bills of lading, were consigned, at the same time, to other persons as the real owners. His title under the general bill of lading, is regarded as nominal and formal, and not a substantial compliance with the intentions of the government, as expressed in the license.(b) In the case in which this decision was made, the words of the license, requiring the property to be in the gran-

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case of *Klingender v. Bond*, as conforming to a permanent rule, of which the decision in *Lemcke v. Vaughan* was an occasional and temporary relaxation.

(a) *The Jonge Classina*, (5 Rob. 299.)

(b) *Feise v. Waters*, (3 Taunt. 248.)

tee, were express; but whether a license for the importation of goods, granted to an individual by name, but extending its protection to the holders of his bills of lading, ought to receive a similar construction, so as to render it necessary to be proved that the goods were shipped on the sole account, and as the property of the grantee, is a question that, by opposite decisions, has been involved in serious doubt.

In a case in which the license to import was confined to the grantees, "*their agents, or the holders of their bills of lading*," it was held by Sir William Scott, that the words admitted no other construction than that the grantees, in their own name, or by their agents, must be the original importers on their own account, and that the license could only enure to their protection as such, or that of the persons to whom they had transferred their interest by a transfer of their bills of lading. As the claimants were, themselves, the importers, and could not substantiate their title, either as the agents of the grantees, or the holders of their bills of lading, he felt himself constrained to reject their claim, and, with much regret, as there was no suspicion of bad faith, condemned the property. In this, as in the preceding case, there was a general bill of lading on board the vessel, consigning the goods to the grantees in the license; but as the master was bound by other bills to deliver the several parcels to the claimants, the general consignment was considered as a formal paper, which, as it conveyed no right, could not be permitted to vary the decision.<sup>(a)</sup> In an action on a policy of insurance where the validity of the contract depended on the

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(a) *The Jonge Johannes*. (4 Rob. 263.)



construction of a similar license, an exactly opposite judgment was delivered by the Court of Common Pleas. In this case, the terms of the license—even the persons to whom it was granted, were the same; there was a general and also particular bills of lading, nor, in truth, is there any circumstance by which it is possible to distinguish the cases. The assured at common law stood exactly in the same relation to the license, as the claimants in the admiralty; yet it was held that their property was protected, and the loss they claimed recoverable under the policy. Thus the insurance was held to be valid in a court of common law, although the property insured, as involved in a trade with the enemy, would certainly have been condemned in a court of prize.(a)

§ 45. It is a question that has been much agitated in the English courts, whether a license that describes the grantees, not by name, but by general words, can be justly construed as intended to embrace and protect the property of alien enemies; but it was finally decided, by the Court of Exchequer Chamber, in reversal of a judgment of the King's Bench, that a license granted during a war between England and Russia, to the plaintiffs, in behalf of themselves and others, permitting them to export a particular cargo to a Russian port, and containing the words—"to whomsoever the property might appear to belong," covered the property of Russian subjects, on whose account the goods were shipped, and under whose orders the license was applied for and obtained; although it

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(a) *Defflis v. Parry*, (3 Bos. & Pull. 3.) The general bill of lading was held to be a sufficient compliance with the license. This decision preceded, by a few months, that of Sir William Scott, but was, probably, unknown to him.

was admitted, that the fact that enemy interests were meant to be protected, was not disclosed when the license was procured. (a) And previous to this decision, it had been determined in the Court of Admiralty, that the general words, "to whomsoever the property may appear to belong, preclude all inquiry into the national character of the owner." (b) It is, however, at least doubtful, whether these, and other similar decisions, are not to be referred to the peculiar circumstances of the war, and to be regarded as the fruits of the extreme liberality of construction that then prevailed; and if so, the judgment of the King's Bench, that was reversed, must be considered as the true expression of the general rule. It is certain, that, during the previous war, it was held by Sir William Scott, that, to cover enemy's property, express words were indispensable; and that no such extension could be given to a license that, in conformity to the terms of an act of Parliament, granted the privilege of importing the goods described, to "any person or persons whatsoever;" (c) words at least as com-

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(a) *Flindt v. Scott*, (5 *Taunt.* 674.) The judgment reversed is reported, (15 *East*, 525,) and a similar judgment was given in *Mennett v. Bonham*, (15 *East*, 477.) The cases sustaining the judgment of reversal are—*Usparicha v. Noble*, (13 *East*, 332;) *Fayle v. Bourdillon*, (3 *Taunt.* 546;) *Morgan v. Oswald*, (*Ib.* 555;) *Feise v. Bell*, (4 *Taunt.* 478;) *Anthony v. Moline*, (5 *Taunt.* 711;) *Schnakoneg v. Andrews*, (*Ib.* 716;) *Robinson v. Touray*, (1 *M. & S.* 217,) and *Hullman v. Whitmore*, (3 *M. & S.* 337.) The two last cases seem to go much further than the judgment of the Exchequer Chamber. In each, the goods of alien enemies were protected under a license to A. B. and other British merchants; but as the words did not require that the grantees should be the owners or importers of the goods, it was held to be sufficient to show that they were the agents of the hostile owners.

(b) *The Cousine Marianne*, (1 *Ed.* 346.)

(c) *The Hoffnung*. (3 *Rob.* 162.) *The Beurse Van Koningsberg*, (*Ib.* 169.)

prehensive as those that were subsequently held to be sufficient and conclusive.

§ 46. A license to an alien enemy, whether by name or by general words, removes all his personal disabilities, so far as is necessary, for his protection in the trade, that, by the operation of the license, is rendered lawful. He has not only the right to insure the property licensed, but to maintain a suit, in his own name, for the recovery of a loss under the policy. In short, he is not an enemy, but has all the privileges of a subject, in respect to the voyage and property that are covered by the license.(a)

§ 47. It is not doubted, that the goods for which the protection of a license is claimed, must correspond with those that the license enumerates or describes. A small excess in the quantity, not attributable to design, it is intimated by Sir William Scott, would not be regarded as prejudicial; but the substitution of goods of a different quality, it is probable, must always be considered an essential deviation. There do not appear to be any circumstances by which it can be justified or excused;(b) but neither a blameable excess in the quantity of the goods, nor the partial substitution of those of a different quality, in cases, free from the imputation of concealment or fraud, is permitted to vitiate absolutely the license, under the color of which they were introduced. The goods not protected by the license are, of necessity, condemned; but those, which it is admitted to embrace, are restored.(c)

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(a) *Morgan v. Oswald. Usparicha v. Noble. Flindt v. Scott, ut sup.*  
Vide also, *Fenton v. Pearson*, (15 *East*, 419.)

(b) *The Cosmopolite*, (4 *Rob.* 11-18.)

(c) *The Cosmopolite. The Jonge Clara*, (1 *Ed.* 371.) *The Juffrow Catharina*, (5 *Rob.* 141.)

§ 48. Where the delivery of goods, covered by a license, at the enemy's port to which they are destined, is prevented by an inevitable accident or justifiable cause, such as the reasonable apprehension of seizure, the original license, although limited in its terms to the outward voyage, is sufficient for the protection both of ship and cargo, on the return; but, to entitle himself to the benefit of this liberal construction, it is necessary for the claimant to prove, that the goods brought back, are the identical goods that were originally exported under the license. (a)

§ 49. If a vessel licensed to proceed in ballast to an enemy's port, for the purpose of importing thence a cargo described in the license, takes on board any cargo, however small, on the outward voyage, she forfeits the protection of the license, and both ship and goods become liable to condemnation; (b) but whether this violation of an essential condition of the license, would subject the vessel to capture on her return voyage, is a question, that I cannot find to have been determined. Where the voyage is entire, the abuse of the license would probably lead to the condemnation of the ship; but the goods of innocent shippers, embraced in the license, would doubtless, be restored.

§ 50. The protection of a license is not limited, in all cases, to the cargo originally shipped; for if the original cargo, by an accident or unforeseen de-

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(a) *The Jonge Frederick*, (1 *Ed.* 357.)

(b) *The Catharina Maria*, (1 *Ed.* 336.) *The Wolfarth*, (*Ibid.* 364.) To these cases, that of *Staniforth v. Coombe*, (5 *Taunt.* 736,) seems to be opposed; but the decision was probably founded on the peculiar terms of the license, and the insurance was on the return cargo.

lay in the voyage, is injured and spoiled, so as to justify its sale, the license is not deemed to be exhausted, but may be justly applied to a second cargo, corresponding with the description in the license; but the loss of the original cargo, and the impossibility of supplying its place by another of the same character, will in no case, justify the shipment of goods, differing in quality and substance, from those that the license requires. Such a deviation from the terms of the license would expose the ship, as well as the cargo to confiscation. (a) It is, however, necessary to be observed, that although a duly substituted cargo is protected by the license, it would not be covered by a policy of insurance, that had been effected and had attached, upon the prior cargo, unless the terms of the contract, plainly warrant such an extension of its risks. A policy fully occupied by the cargo originally shipped, is exhausted by such an application, and to construe it, as embracing the successive risks of successive cargoes, would be to charge the insurers with a responsibility they never meant to assume. (b)

§ 51. It is never admitted as a valid excuse for the reception at an enemy's port of goods, not permitted by the license, that they were put on board by the orders or force of the hostile government: that the master, to avoid a final seizure, was compelled to receive them. Were such excuses allowed, it would be impossible for a court of admiralty

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(a) *The Wolfarth*, (1 *Dod.* 305.)

(b) Lord Ellenborough, in *Siffken v. Allnutt*, (1 *M. & S.* 45.) In this case, a substituted cargo was held to be covered, not only by the license, but by the insurance; but on the express ground, that the policy had not attached on the first cargo, and, from its terms, could only be applied to the second.

to guard itself against the incessant attempts that would be made to elude its vigilance, and mislead its judgment. It would never be able to determine whether the transactions in the enemy's port, were voluntary or otherwise. Compulsion would be constantly pleaded, and collusion as constantly practised. Hence, this is one of the cases in which the hazard of abuse, and the impossibility of its detection, justify the exclusion of a defence apparently equitable, and of the evidence necessary to support it.(a)

§ 52. When a license authorizes the importation of goods from an enemy's country, in an enemy ship, the protection intended to be granted, although confined, in terms, to the goods, by the just construction of law is extended to the vessel. The necessary effect of such a license, is to legalize the voyage, as described, in all its incidents, and hence the ship is just as much a legitimate object of insurance as the cargo.(b) The proposition, meant to be stated in this section, is not to be limited to the particular case that has been mentioned. The rule is doubtless universal, that the license of a cargo embraces, by a necessary implication, the vehicle of transportation, if such, as the license authorizes or permits to be employed.

§ 53. The national character of the ship, as described in the license, is, in most cases, a condition necessary to be fulfilled, to secure the protection that is desired. Where the license directs the employment of a neutral ship belonging to a particular nation, the substitution of a neutral ship belong-

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(a) *The Seyerstadt*, (1 *Dod.* 241.) *The Catherine Maria*, (1 *Ed.* 337.)  
Sed vide *Jenks v. Hallett*, (3 *Cranch*, 210.) *Sup.* p. 346.

(b) *Kensington v. Inglis*, (9 *East*, 273.)

ing to a different state, standing in the same political relations to the belligerent powers, would probably not be regarded as prejudicial. The change is so immaterial, that the liberty to make it, had it been requested, there is no reason to suppose, would have been denied ; hence, its permission is not believed to contravene the intentions of the government.(a) For similar reasons, the employment of two ships, when the terms of the license refer only to one, will not be permitted to vitiate the grant, when a reasonable cause is assigned for the change, the vessels bear the same national character, and there is no excess in the quantity, or variation in the quality, of the goods, as described in the license.(b) But the employment of a British ship, when the license requires a neutral, is considered an essential deviation, since there may be valid reasons, that dispose the government not to permit a trade with the enemy in British ships, at the same time that it allows a communication in neutral bottoms, and it would be a stretch of authority in the court to say that the permission of the latter virtually included the former.(c) Yet, where the ship employed is neutral in appearance, and by her documents, the court will not be solicitous to inquire into the allegation of British ownership ; where the fact is disclosed by the original evidence, it leads to a condemnation ; but when not thus established, farther proof will not be allowed, in order to substantiate the charge.(d)

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(a) *The Dankbaarheid*, (1 *Dod.* 183.)

(b) *The Vrow Cornelia*, (1 *Ed.* 340.)

(c) *The Jonge Arend*, (5 *Rob.* 14.)

(d) *The Goede Hoffnung*, (1 *Dod.* 257.)

The employment of a ship belonging to the enemy, when not authorized by the terms or fair construction of the license, is, in all cases, noxious and fatal. It is treated as a fraud on the intentions of the government, and, as such, it is watched with a scrupulous jealousy—and when detected, as a general rule, leads to the confiscation of ship and cargo.(a)

§ 54. When the license authorises the transportation of the goods, by any ship or ships whatever, excluding only such as bear the flag of the enemy, the exclusion is construed to refer to the fact, and not merely to the external signs, of hostile ownership. Where the vessel is discovered to belong to the enemy, although documented as a neutral, and bearing a neutral flag, she is, of necessity, condemned; but the goods covered by the license, if belonging to other persons than the owners of the ship, will be restored.(b) And if the ship was, in fact, neutral when she sailed, but, by an unexpected change of circumstances acquired a hostile character during the voyage, the honest intentions of the parties to comply with the terms of the license, will continue its safeguard, both to ship and cargo. This liberal decision was made by Sir William Scott, in a case where the owners of the ship became French subjects, during the voyage, by the sudden annexation to France of the port and territory in which they resided.(c) It is a just deduction from the language of the same learned judge, on another occasion, that the unauthorized

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(a) *The Hoffnung*, (2 *Rob.* 162.) *The Dankbaarheid*, ut sup.

(b) *The Bourse*, (1 *Ed.* 369.)

(c) *The Jonge Clara*, (*Ib.* 371.)



employment of an enemy ship, whether openly or in disguise, is never permitted to affect the goods of shippers who were not privy to the deception, or cognizant of the fact. Where there is no ground for imputing to them a voluntary departure from the conditions of the license, their property, if embraced by its terms, retains its protection.(a)

§ 55. A general license for the transportation of the goods by a ship or ships, to render it effectual, must be appropriated by some positive act to the particular ship, for which its protection is claimed. Generally speaking, this appropriation is made, and is required to be made, by an endorsement on the license ; but where no such endorsement is made, nor, by the terms of the license, is required, the license must be connected with the ship to which it is sought to be applied by positive evidence, that this application was intended by the parties entitled to its use, and of their intentions, the mere fact, that the license was found on board the vessel claiming its protection, is not regarded as sufficient proof.(b) These rules seem to be necessary to prevent a misapplication of the license, by persons having no just title to avail themselves of its protection. By departing from them, the privilege granted might be transferred to a stranger who had acquired the possession of the license, by accident or fraud, or to whom it had been entrusted for a special and different purpose.

§ 56. The requisitions of the license as to the course of the voyage, and the ports of destination and departure must, generally speaking, be strictly fol-

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(a) *The Dankbaarheid*, (1 *Dod.* 183.)

(b) *The Speculation*, (*Ed.* 344.)

lowed. Thus where the license directs that the ship shall stop at a particular port for convoy, the neglect or omission to comply with the direction invalidates the license. The prescribed condition is regarded as fundamental, and the breach of it as fatal; although, in this and similar cases, if the deviation from the prescribed course of the voyage, is produced by stress of weather, or other unavoidable accident, the necessity is admitted as a valid excuse.(a) So, the vessel forfeits wholly the protection of the license by touching for orders at an interdicted port; but a deviation for the same purpose to a neutral, or other port not forbidden, although not authorized by the terms of the license, seems not to impair its legal effect;(b) and this instance is another example of the wide difference in construction between a license and a policy of insurance, since a voluntary deviation, not authorized by the policy, in all cases avoids the insurance. A port of shipment or delivery, of departure or destination, mentioned in the license, cannot be changed without impairing its validity, although, in a single case, the substitution of a port of shipment, different from that mentioned in the license, was allowed by Sir William Scott, on the ground of necessity.(c) It is, however, doubtful from the language of the learned judge, whether this case is not to be

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(a) *The Europa*, (Ed. 341.) *The Minerva*, (*Ibid.* 375.)

(b) *The Frau Magdalena*, (*Ib.* 367.) *The Emma*, (*Ib.* 366.) *The Hoppet*, (*Ib.* 369.)

(c) *The Tvee Gebrøders*, (Ed. Ad. Dec. 97.) *The Marely*, (1 *Dod.* 257.) *The Vrow Cornelia*, (Ed. Ad. Dec. 349.) Vide, also, the *Byfield*, (Ed. Ad. Dec. 188.) in which it was held, that a general license to import from any port, does not include an enemy's port under blockade.

classed with those, in which the decision was governed by the peculiar character of the war, and the extraordinary difficulties to which British commerce was then subjected.

§ 57. A license, like every other grant, carries with it an implied authority for the use of all the means necessary to the attainment of the end. Hence, a license to a ship, in her home port, to import a cargo from an enemy's port, (a) legitimates and protects her outward voyage; and a license to export a cargo to an enemy's port, covers the ship on her return. (b) In each of these cases, the voyage, to which the protection of the license is extended by implication, has a necessary connection with that, to which it expressly relates. The implied protection, however, is confined to the ship sailing in ballast. The taking on board a cargo subjects both ship and goods to confiscation.

§ 58. A license usually contains a limitation of the period of time within which it is to be carried into effect, and this limitation is, by no means, to be considered as immaterial. The government, in granting such licenses, it must be supposed, takes into view all the considerations, commercial and political, that bear upon the subject; and hence in the sound exercise of its judgment, it may well permit a communication with the enemy at one period, that at another it would esteem to be highly inexpedient or dangerous. Time is, therefore, always an important ingredient; so that the party who takes upon himself, at his own discretion, to

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(a) *The Cornelia*, (Ed. A. R. 36.) *Le Cheminant v. Pearson*, (4 Taunt. 367.)

(b) *The Friendschaft*, (1 Dod. 316.)

extend the period, loses the protection to which he would otherwise have been entitled.(a) It is not, however, to be inferred, from these observations, that the limitation of time in a license is subject to a strict and literal interpretation. On the contrary, the rule has always been, that the failure of the party to comply strictly, with the conditions of the license, shall not be permitted to vitiate its effect, where he is proved to have acted with due diligence, and the failure is shown to have arisen from circumstances, that it was beyond his power to control, such as the fury of the elements, or the acts of a hostile government.(b) This rule is sanctioned by numerous decisions in the courts of common law, as well as in the admiralty, in which a retardation from stress of weather, an embargo in an enemy's port, and other similar causes, has been held to continue in force an expired license, and this, even in cases where the effect of the constrained delay was to prevent the inception of the voyage, until the period limited had wholly elapsed.(c) The time, during which the party was prevented from acting, by obstacles which he could not surmount, is, as it were, annihilated, and is not to be considered at all in computing the period that the government intended to allow.(d)

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(a) Sir William Scott in the *Cosmopolite*, (1 *Rob.* 12 and 13.) Vide *Vandeyck v. Whitmore*, (1 *East*, 475.)

(b) Sir William Scott in the *Goede Hoop*, (*Ed. Ad. De.* 327.)

(c) *Freeland v. Walker*, (4 *Taunt.* 478.) *Leevin v. Cormac*, (*ib.* 483.) *Effurth v. Smith*, (5 *Taunt.* 329.) *Siffkin v. Allnutt*, (1 *M. & S.* 39.) *Siffkin v. Glover*, (4 *Taunt.* 77.) *Schroeder v. Vaux*, (15 *East*, 52.) *Groning v. Crockatt*, (3 *Camp.* 85.) *The Vrow Cornelia*, (*Ed. Ad. R.* 349.) *The Johann Pieter*, (*ib.* 349.) *The Sarah Maria*, (*ib.* 361.) *The Diana*, (2 *Act.* 34.) *Æolus*, (1 *Dod.* 300.)

(d) Sir William Scott, in the *Goede Hoop*, *ut sup.*

§ 59. There is, however, a material distinction between the construction of a license for the exportation of goods to an enemy's port, and that of one where the question relates to an importation merely. It is only in the latter case, that the period of time, as defined in the license, is capable of extension. When the license requires that the goods to which it relates, shall be exported on or before a certain day, the delay of the exportation for a single day beyond that which is specified, renders the license wholly void, and where a policy has been effected, vacates the insurance; nor will any evidence be admitted, to show that the delay was produced by a justifiable or inevitable cause. (a) The grounds of the distinction are, that where the vessel is in her home port, an extension of the license, if proper to be granted, can be readily obtained from the government; that to apply for such an extension, is, therefore, the duty of the merchant, that no alleged necessity can prevent the discharge of this duty, and consequently, cannot be admitted as a valid excuse for a departure from the terms of the license.

§ 60. If there are any terms or conditions in a license, in addition to those that have been stated, which, from their nature, it is reasonable to believe, were regarded by the government as material, there exists the same necessity for requiring their fulfilment, to render effectual the privilege granted.

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(a) *Williams v. Marshall*, (6 *Taunt.* 390. S. C., 7 *Taunt.* 468.) *Tulloch v. Boyd*, (7 *Taunt.* 472.) It does not appear that any similar decisions have been made in the admiralty, nor do these cases seem easy to be reconciled with the principle of Sir William Scott's decision, in the *Æolus*, (1 *Dod.* 300,) where he held, that the necessity proved, operated to extend a license that the government had refused to renew.

Thus, where a license to authorize a trading with an enemy's country, was granted under an order of council which required that a bond should be given by the parties to the commissioners of the customs, to secure the due landing of the goods at the ports described in the license, and that a certificate from a British consul, of the fact of such landing, should be produced within a limited time, it was held, that the omission to comply with these conditions, rendered the voyage illegal, and avoided the insurance.(a)

§ 61. No principle, applicable to the subject under consideration, is better founded in reason and justice, than that all persons, trading under the protection of a license, are bound to act, in all cases, with the purest good faith. The fraudulent application of a license, to purposes not intended by the grantor, renders it wholly void, and exposes to confiscation even the goods that are embraced by its terms. Thus, where the parties who claimed the protection of a license, which authorized the vessel to proceed only with a cargo of corn on the voyage described, put on board secretly a quantity of fire-arms, and endeavored to conceal them by stowing them under the cargo, as it was impossible to believe that the government meant to sanction the transportation of articles of this noxious character, it was held, that the breach of good faith amounted to a total defeasance of the license, and, consequently, both ship and cargo were condemned.(b) So, a ship, licensed to proceed to an enemy's port, for purposes connected with British

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(a) *Vandyck v. Whitmore*, (1 *East*, 486.)

(b) *The Nicoline*, (*Ed. Ad. R.* 363.)

[LECT. VI.]

*Illegal Insurances.*

ie, forfeited the protection of the license, by prosecuting the voyage for an object wholly different from that which the license contemplated. The voyage, although covered by the terms of the license, was rendered illegal by the fraudulent intent of the party, not to accomplish the purpose which was alone in the view of the government, in granting the protection he claimed. (a) So, where the ship was permitted, by the terms of the license, to touch at a particular port for orders, her reception of a cargo at this port, was regarded, not simply as a violation of the terms of the license, but as an abuse involving a breach of good faith, and consequently, operating as an absolute revocation of the privileges granted. (b) Nor is it in all cases necessary, that the party who is deprived of the protection of a license, should be a party to the fraud by which it is annulled. A fraudulent alteration in its date vitiates the license, even in the hands of an innocent purchaser, (c) and the same effect is doubtless produced by every material and unauthorized change in the terms of the instrument.

§ 62. To close this subject, it remains only to state that a ship or goods lawfully captured, are not saved from condemnation by the production of a license, embracing in its terms the entire voyage or adventure, but which is proved to have been granted after the day on which the capture had taken place. A license is in its nature prospective. It is not to be presumed that it was intended by the

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(a) *The Speculation*, (Ed. Ad. R. 344.)  
(b) *The Henrietta*, (1 *Dod*, 168.)  
(c) *The Louisa Charlotte*, (*ibid.* 308.)

government to apply to a past transaction, so as to legalize a voyage already commenced ; still less should it be construed as intended to defeat the vested rights of captors. Although the sovereign power of the state has an unquestionable right to release captured property against the will, and without regard to the interests of the captor, yet the intention to exercise this right must be manifested, by a proper instrument and by express words. It cannot reasonably be implied from the general terms of the license.(a)

An insurance on a voyage that could only be legal, when protected by a license, was held by Lord Ellenborough to be wholly void, when it appeared in evidence that the vessel had in fact sailed a few days before that, on which the license, intended for her protection, was granted and dated. But, as the policy was effected in ignorance and in good faith, it was also held by his lordship, that the assured were entitled to a recovery of the premium they had paid. This case is conclusive to show that a license cannot operate retrospectively, and that the voyage to which it applies, is only legalized, when it is commenced within the period that the license defines.(b)

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(a) *The St. Ivan*, (*Ed. Ad. R.* 376.) *The Edel Catharina*, (1 *Dod.* 55.)

(b) *Henry v. Stanniforth*, (4 *Comp.* 270.)



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## ILLEGAL INSURANCES.

## BREACH OF NEUTRALITY.

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### LECTURE VII.

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§ 1. The subjects that remain to be considered, are :

I. The liability to capture on the ocean of the property of neutrals.

II. Insurances void in their origin as contraven-

ing the duties of the state, within which they are effected, as a neutral power.

They will be embraced and concluded in the present and in a succeeding lecture.

*1. Of the liability to capture of neutral property.*

§ 2. When an independent nation in the exercise of its own sovereignty, chooses to remain neutral, whilst other powers are engaged in war, there arise from its relation of neutrality, certain rights and duties, the exact definition of which, forms an important branch of the law of nations. This subject, however, in its whole extent, is by no means embraced in my present design, which is limited to the consideration of the cases in which the property of neutral subjects on the ocean, in consequence of the violation of some duty that the law of nations imposes, becomes liable to belligerent capture, and in which an insurance upon such property, if made in the belligerent country, whose rights are violated, is either void in its origin, or becomes so from the time of the commission of the unlawful act, by which the immunities of neutrality were forfeited.

§ 3. The duties which are thus incumbent on the subjects or citizens of a neutral state, may with propriety be stated as embraced in the following general propositions. It is their duty—

1. To abstain from every act that tends directly to the assistance of either of the belligerents in the prosecution of the war.

2. To abstain from every act that tends directly to relieve one of the belligerents from the pressure and effect of the opposite hostilities. And lastly—

3. To offer no resistance to the full exercise of

the belligerent rights of visitation and search, and to resort to no means for eluding and defrauding the rights of capture.

It is under these heads that the various cases in which neutral property is rightfully subject to condemnation, will be arranged and considered.

§ 4. The duty of not furnishing direct aid in the prosecution of the war, is violated by the transportation to a belligerent country or ports of those articles that are usually denominated contraband of war, and the breach of this duty subjects the property to capture by the opposite belligerent. The extent of the penalty for the carriage of contraband articles, is not fixed by any positive and uniform rule, but is varied by special circumstances. The noxious articles are invariably condemned ; no defence or plea can save them from confiscation, when their, true character and their destination to a hostile port, are admitted or established. By the ancient law of Europe, the contraband cargo affected the ship, and involved it in the same sentence of condemnation ; nor can it be said that the penalty was unjust in itself, or unsupported by the analogies of the law ;(a) but by the modern practice of the English admiralty, which is followed in the United States, and it is believed by other nations, a milder rule has been adopted, and the carrying of contraband is now attended, only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of car-

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(a) Bynkershoek, Q. J. P., lib. 1 ch. 14, vindicates the justice of the ancient and stricter rule, and Heineccius maintains the same opinion, (*De Næv. &c.*, ch. 2, § 6.) Vide, also, a note of Sir C. Robinson, (3 Rob. 221.)

rying the cargo, is connected with other malignant and aggravating circumstances.(a)

§ 5. Thus, where the transportation of the contraband articles is prohibited by the special provisions of a treaty, to which the government of the neutral ship-owner is a party, as the criminality of his conduct is enhanced by the violation of the additional duty that the treaty creates, it is punished by an aggravation of the penalty, and the forfeiture of the freight is extended to the ship.(b) There are other cases of misconduct, such as the attempt to conceal the destination of the ship by false papers, that lead to the same result ; but it is to another branch of our subject, that the examination of these cases properly belongs.(c)

§ 6. The ordinary penalty of the loss of freight to which the ship is subject, is not to be averted by the allegation that the owner or master were ignorant of the true nature of the contraband articles, or that by the threats or violence of the enemy, they were compelled to receive and transport them.(d)

(a) The *Ringende Jacob*, (1 *Rob.* 89.) The *Mercurius*, (*Ib.* 288.) The *Jonge Tobias*, (*Ib.* 329.) The *Franklin*, (3 *Rob.* 217.) In a single case, (the *Neptunus*, 3 *Rob.* 108,) Sir William Scott allowed freight upon the ground that the contraband article bore a very small proportion to the entire cargo. In the *Jonge Margaretha*, (1 *Rob.* 189,) the usual penalty of the confiscation of the ship, although belonging to the proprietor of the contraband, was not enforced, on the ground that the party had been misled, and had relied on an irregular indulgence that had been exercised in former cases ; and, in the *Charlotte*, (5 *Rob.* 277,) the innocent goods of the owner of the contraband articles condemned, were restored, on the grounds, that the case was new, and turned on the doubtful construction of a treaty.

(b) The *Neutralitet*, (3 *Rob.* 295.) The *Eenrom*, (2 *Rob.* 6.)

(c) *Post*, *Lec.* VIII.

(d) The *Oster Risoer*, (4 *Rob.* 199.) The *Richmond*, (5 *Rob.* 325.) The *Carolina*, (4 *Rob.* 260.)

Such excuses, if allowed, would be constantly urged, and in time would rob the prohibition of contraband of its penal character, and convert it into a nugatory threat. Where the cargo of the captured ship does not consist wholly of contraband articles, the innocent goods of innocent shippers are restored; but all, that are the property of the owner of the contraband, are affected by its contagion and share its fate. Their confiscation is a part of the penalty with which his misconduct is visited.(a) The rule is stated as universal, that where the transaction in which the party is concerned, is illegal, the whole of his property, embarked in the same transaction, is liable to the penalty that the law imposes.(b)

§ 7. From the moment that a ship, with contraband articles on board, quits her port on a hostile destination, as a general rule, the offence is complete, and, to legalize the capture, it is by no means necessary to wait until the ship and goods are actually endeavoring to enter the enemy's port; but where the goods are not thus taken *in delicto*, in the actual prosecution of the voyage to an enemy's port, the penalty is not generally held to attach, either upon the proceeds of the goods, or on the ship upon the return voyage.(c)

§ 8. It is, however, very doubtful, whether this rule is not confined, in its application, to the cases in which the outward and return voyage are distinct and independent—to cases, in which the nature and character of the return voyage depend

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(a) *The Charlotte*, (5 Rob. 275.) *The Stadt Embden*, (1 Rob. 26.)

(b) Sir William Scott in *the Jonge Tobias*, (1 Rob. 330.)

(c) Sir William Scott in *the Imina*, (3 Rob. 168.)

upon contingencies, such as the instructions or advice the master may receive at the port of outward delivery. These doubts are not only justified by the language of Sir William Scott, on another occasion,(a) but by the rule that we have seen to prevail in analogous cases.(b) Where the outward and return voyages are inseparably connected, in their original plan, so as to form parts of a continuous and entire voyage, there seems to be no reason for exempting the conveyance of contraband, from the operation of the general rule, that considers an entire voyage, when illegal at its inception, to be illegal throughout; and in every stage of it, until its final completion, holds the property to be *in delicto* and liable to capture. At any rate, the doctrine is established by several decisions of the English admiralty, that where the adventure is entire, and the ship, with a contraband cargo, proceeds on her outward voyage with false papers, intended to conceal her destination to an enemy's port, the fraud is not limited, in its noxious consequences, to the outward passage; it extends to and contaminates the return voyage, and involves both the ship and the proceeds of her outward cargo, if captured during that voyage, in the same sentence of confiscation. Where the parties set out on such an expedition, with ill faith, and with the same ill faith pursue it to its consummation, in the delivery of the outward cargo, they are implicated in the consequences of their conduct throughout the whole sequel of the transaction.(c)

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(a) *The Nancy*, (3 Rob. 127.)

(b) *Sup. Lec. III.* § 27-28, pp. 336-7-8.

(c) *The Nancy*, (3 Rob. 122.) *The Rosalie and Betty*, (2 Rob. 348.) *The*



§ 9. The legal offence, however, that results from the carrying of contraband is not necessarily so complete by the mere inception of the voyage, with a hostile destination, as in all cases to render lawful

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same doctrine was confirmed by the Lords of appeal, in the *Rosalie* and the *Elizabeth*, (4 *Rob.*, note to table of cases,) and in the *Baltic*, (1 *Act. Appeal Cases*, 25,) and in the *Margarette*, (*Ib.* 333.) Mr. Wheaton, in his *Digest of the Law of Captures*, p. 183, questions strongly the propriety of these decisions, and treats them as an "innovation not founded on principle," and in his excellent work on *International Law*, (2d vol., p. 219,) he repeats the censure. The ground of his objection is, that, to pass the limits of the outward voyage, where the contraband articles are on board, is to extend the *delictum* indefinitely, so as to embrace not only the return voyage, but all future voyages of the same vessel, which, consequently, would "never be purified from the contagion communicated by the contraband articles." But a complete answer to this objection is furnished by the decisions themselves, which, in express terms, limit the offence and its penal consequences to the completion of the entire voyage; and with these limitations, the cases, even omitting the ingredient of fraud, are in perfect harmony, not only with the decisions of the English courts of common law, but with the judgment of the Supreme Court of the United States, in the *Joseph*, (8 *Cranch*, 451. *Sup.* p. 571.) In the case of the *Caledonian*, (4 *Wheat.* 100,) the Supreme Court of the United States has gone one step beyond the English decisions, for it was there determined, that an American ship, which had been engaged in a trade with the enemy on her outward voyage, after her arrival on her return, was liable to a seizure in port. According to this decision, the *delictum* is not purged even by the termination of the return voyage, but continues in force until the vessel sails on a new and distinct voyage. In the *Christiansberg*, (6 *Rob.* 381,) Sir Wm. Scott takes notice of the very objection on which Mr. Wheaton relies, that, if the penalty is applied to the subsequent voyage, it may travel on with the vessel for ever, and he replies, that, although in principle it might, perhaps, not unjustly be pursued beyond the immediate voyage, yet, that in practice, it had never been carried further than to the voyage succeeding, (that is, the return voyage,) which affords the first opportunity for vindicating the law. Vide, also, *Parkman v. Allen*, (*Stair's Dec.*, vol. i., p. 29,) and the *Randers Bye*, which are cited by Sir C. Robinson, in a note, (6 *Rob.* 382.) In the case of *Carrington v. The Merchants' Ins. Co.*, (8 *Peters' S. C. Rep.*, opinion of Mr. J. Story, 521,) the Supreme Court of the United States seems to have given its express sanction to the decisions, that Mr. Wheaton has questioned; and their language is so understood by Chancellor Kent, (*Kent's Comment.*, 5th ed., 151, note.)

a subsequent capture, even where the capture is made while the contraband articles are still on board. Where there is positive evidence, that previous to the capture, the voyage had been changed, by the substitution of an innocent port of destination,<sup>(a)</sup> or that the original port by capitulation or otherwise had ceased to be hostile,<sup>(b)</sup> as the goods were not contraband when seized, the capture is invalid, and restitution is decreed. The original intention to prosecute an illegal voyage is not sufficient to constitute the offence to which the penalty of the law applies, if the intention, when the capture was made, had in good faith been abandoned, or was no longer capable of execution, although the penalty is not averted by the mere possibility that such an intention, which is in the progress of execution, will be changed before its completion. The principle on which the court proceed in these cases is, that there must be a *delictum* existing at the time of seizure, to sustain the penalty, and that by a variation in the intentions of the party, or a change of the hostile character of the port of destination, the *corpus delicti* is extinguished. In language less technical, there must be a substantive offence at the time of seizure, and this cannot exist, unless the facts, necessary to its completion, remain unchanged.

§ 10. To render the transportation of contraband an illegal voyage, it is not necessary that it should bear the character of an original importation into an enemy's country. Such a transportation

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(a) *The Imina*, (3 *Rob.* 167.)

(b) *The Trende Sostre*, (6 *Rob.* 390,) in notis. Vide *Sup. Lec. IV.* § 16. pp. 571, 572. The same rules apply to a voyage to a blockaded port. *The Lisette*, (6 *Rob.* 387.) *infra*, § 63.

from one port of the enemy to another, may have the effect, and be justly subject to the penalty of an unlawful supply, as tending directly to assist the enemy in the prosecution of the war. It is, therefore, established that the transfer of contraband from one port of an enemy's country to another, where it is required for the purposes of war, is subject to be treated in the same manner as an original importation.<sup>(a)</sup> Nor is it necessary that the immediate destination of a ship with a contraband cargo should be to an enemy's country or port. To justify the capture, it is enough, that the immediate object of the voyage is to supply the enemy, and that the contraband is certainly destined to his immediate use. It is true, that goods destined for the use of a neutral country, can never be deemed contraband, whatever may be their character, and however well adapted they may be to the purposes of war; but if they are destined for the direct use of the enemy's army or navy, there is no principle or authority that can exempt them from forfeiture, on the mere ground that they are neutral property, and that the port of delivery is also neutral. Should an enemy's fleet be lying, in time of war, in a neutral port, it would be impossible to consider as lawful the voyage of a neutral ship, bound to that port with a contraband cargo, not intended for sale in the neutral market, but destined to the exclusive supply of the hostile fleet. Such conduct would be a direct interposition in the war, furnishing to the enemy most essential aid in its prosecution, and, consequently, would be a flagrant departure from the

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(a) *The Edward*. Opinion of Sir Wm. Scott, (4 *Rob.* 70.)

duties of neutrality.(a) It was by these principles that the Supreme Court of the United States was governed, in determining that a Swedish ship, which, during the last war between England and the United States, was bound to Portugal, with a cargo of provisions, destined to the supply of the British armies in that country, was lawfully subject, during the voyage, to American capture, and was liable, from the nature of her cargo, rendered contraband by its intended use, to the usual penalty of the loss of freight. Some doubts may, perhaps, exist as to the propriety of the decision in the particular case—none as to the truth of the general principles on which it was founded.(b)

§ 11. It is by no means easy to determine, what are the articles, that, by the general law of nations, it is proper to enumerate in the list of contraband. To a certain extent, all the writers on public law are agreed. It is doubted by none, that all the implements and munitions of war, all articles, that, in their actual state, are of immediate use for war-like purposes, are to be deemed contraband, in

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(a) Mr. J. Story, in the *Commercen*, (1 *Wheat.* 388-9.)

(b) The *Commercen*, (1 *Wheat.* 322.) C. J. Marshall dissented from the majority of the court, but his dissent was founded on the special circumstances of the case. He contended, 1. That the hostilities in which the British armies in Portugal were engaged, were so wholly distinct from the war between England and the United States, that the latter could not be at all prejudiced by the aid that was furnished. 2. That Sweden, being an ally with Great Britain, in the war against France, had the same right to send supplies to a British army, engaged exclusively in that war, that she would have had to supply her own, and that which the Swedish government might lawfully have done, was a lawful commerce to her subjects. That there is great apparent force in these reasons, it seems impossible to deny. Indeed, the reasons assigned by this illustrious judge, in support of his opinions, are always such as to induce hesitation, when they do not compel assent.

their own nature, whenever they are destined to an enemy's country or use; but beyond these limits, there exists a diversity of sentiment, that we should attempt in vain to reconcile. Grotius divides all articles that are the subject of exportation into three classes—1. Such as are directly useful for the purposes of war—2. Such as are useful only for civil purposes; and 3. Articles of promiscuous use; that is, that may be used indiscriminately, in war and in peace, such as money, naval stores, and provisions. Those in the first class, he decides, are contraband in their own nature. Those in the second can never, in any circumstances, be so considered; and those of promiscuous use, are contraband or otherwise, as an undefined necessity, may or may not exist, to justify a belligerent seizure. Loccenius plainly holds the opinion, that provisions are universally contraband, and he refers to many instances, in which, by different nations, the prohibition had been enforced.

Heineccius includes articles of promiscuous use, such as naval stores and provisions, in the list of contraband. Vattel, naval stores, and, under special circumstances, provisions. Valin and Pothier wholly exclude provisions, but admit, that, by general usage, at the time they wrote, naval stores were prohibited. Bynkershoek differs from all the preceding writers. Although the general tone of his treatise is by no means favorable to the claims of neutrals, he approves himself on this subject their strenuous champion. He rejects the distinctions of Grotius as illogical and fanciful. He denies that any articles of promiscuous use, or, to speak more properly, that any other than such, as in their actual state, are immediately applicable to warlike

purposes, can be justly treated as contraband, or that any plea of a special necessity, of which the belligerent constitutes himself the judge, can justify their seizure ; and, he earnestly contends, that, to exceed these limits, is to invest the belligerent powers with an absolute control over the commerce of neutrals, If all articles are to be proscribed as contraband, that are or may be fitted for naval or military use, small indeed is the number of those that can possibly escape the operation of the rule, and the inevitable result, in his judgment, of the sweeping interdict, is the total prohibition of neutral trade.

Nor is it merely in the views of the writers on public law, that this discordancy in the definition of contraband will be found to exist. If we turn from their writings, to the conventional law of nations, and endeavor to ascertain what has been the understanding and practice of the modern governments of Europe, by a reference to their treaties, the transition serves only to renew our perplexity. So various and contradictory are the provisions, that, in this research, we are led to compare, that we are soon reduced to confess, that no magic of construction can evoke, from these depths, even a shadowy resemblance of a consistent rule. The only proper conclusion from the whole inquiry seems to be, that the ancient rule was probably that to which Bynkershoek adheres ; but that by the provisions of modern treaties, and the usage of some nations, particularly England and France, the circle of contraband has been gradually enlarged, and the just limits of neutral trade proportionally contracted. The phrase, " the just limits," is eminently proper, if our reflections shall force us to assent to the reasoning of Bynkershoek, that

the principle on which articles of *promiscuous* use, not destined to the immediate supply of the army or navy of the enemy, are declared contraband, is capable of an indefinite extension, and may be pressed, to the entire destruction of neutral commerce.(a)

§ 12. Abandoning, then, as hopeless, the attempt to state the rules of a universal law, let us endeavor to extract from the decisions, the existing law in the definition of contraband, as understood and administered in the courts of England, and as (perhaps with some exceptions,) it will probably be understood and administered, in those of the United States. This is, in truth, the law that we are most concerned to know, since the validity of insurances in England and in the United States, that are alleged to violate the law of nations, can only be determined by the rules of that law, as interpreted and applied by their own tribunals.

The rule, admitted by all, that condemns as con-

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(a) Grotius de Jur., B. & P., lib. 3, cap. 1, § 5. Loccenius de Jure Marit. lib. 1, cap. 4, § 9. Heineccius de Navibus, &c., cap. 1, § 14. Vattel, lib. 3, ch. 7, § 112. 2 Valin Comment., 264, liv. 3, tit. 9, art. 11. Pothier Traité de Propriété, n. 104. Wheat. Hist. of Mod. Law of Nations, p. 126 a 137. 2 Inter. Law, 185 a 190. Bynkershoek, Q. J. P., lib. 1, cap. 10. The Marine Ordinance of Louis XIV., 1681, limits contraband to munitions of war. So, also, the treaties between England and Sweden, of 1656, 1661, 1664, and 1665. Bynkershoek, (*ut sup.*) refers to several other treaties of the seventeenth century, as containing the same limitation. Sir Leoline Jenkins, the judge of the admiralty in the reign of Charles II., in a letter to that monarch respecting the case of a Swedish vessel, laden with naval stores, says—"I am humbly of opinion, that nothing ought to be judged contraband, by the general law of nations, but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places." (Wheat. Law on Nations, 130.) So that there seems little reason to doubt that such was the ancient rule. On the danger of considering provisions, and other articles of promiscuous use, as contraband, see the observations of Mr. Pinkney, as given by Mr. Wheaton, (2 Wheat. Inter. Law, 206-7.)

traband all the instruments and munitions of war, scarcely requires a further elucidation. It embraces, by its terms, ordnance and arms of every description, cannon and musket balls, and gunpowder, and, by its fair construction, all articles that are necessary or convenient to the efficient use of those that its terms describe, such as swords, belts, and scabbards, holsters, cartouch boxes, gun-carriages, and ammunition waggons. (a) A ship evidently built for warlike purposes, and destined to be sold for such purposes in an enemy's port, is clearly liable to confiscation, under the same rule. It is contraband in its most complete form; but to justify the application of the principle in such cases, no doubt must exist as to the character of the ship, or as to the fact and purpose of her intended sale. (b) I collect from the decisions of Sir William Scott that by the established doctrine of the English admiralty, all manufactured articles that in their actual state (c) are fitted for military or naval use, and more especially for the building and equipping of ships of war, such as masts, spars, rudders, wheels, tillers, sails and sail-cloth, cordage, rigging and anchors, are contraband, in their own nature, to the same extent as munitions of war, and that no exception is ad-

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(a) Bynkershoek Q. J. P. lib. 1, cap. 10. According to Bynkershoek *salt-petre* has always been considered contraband. The French ordinance includes horses and their trappings, meaning, doubtless, horses fit for military service.

(b) The *Richmond*, (5 Rob. 325.) The *Brutus*, (*Ibid.* Append. note.)

(c) The words "military use" are ambiguous and in the reported cases are plainly used in different senses. In their strict and primary meaning, they apply only to the direct implements and munitions of war. In their secondary, they embrace all articles of military or naval equipment, or destined to supply the physical wants of soldiers and sailors. It is of course in this latter sense, that they are used in this passage of the text, and are subsequently applied to naval stores and provisions.



mitted in their favor, unless created by the express provisions of a treaty. (a)

§ 13. Pitch, tar, and hemp, destined to the enemy's use, are generally contraband in their own nature; but, where they are not prohibited by the terms of a treaty, an exception in their favor, which is stated to be a relaxation of the former practice of the admiralty, is now allowed in a special case. Where they are the produce of the neutral country, from which they are exported, and are the property of its subjects or citizens, they are exempt from confiscation. They cannot, however, claim the benefit of this exemption, when they are exclusively and immediately destined to warlike use, or where they are destined, not to a port chiefly mercantile in its character, but to one of known naval equipment. As where they are destined to a mercantile port, they are saved from confiscation by the

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(a) *The Charlotte*, Koltzenberg, (5 *Rob.* 305.) *Neptunus*, (3 *Rob.* 108.) In the *Charlotte*, masts and spars were held to be universally contraband on the principle stated in the text, and which applies to all the articles enumerated. Mr. Wheaton, (2 *Inter. Law*, 494.) supposes that Sir Wm. Scott, by his decision in this case, in effect, abandoned a distinction he had formerly made, by which naval stores, in some cases, are held not to be contraband, unless destined to a port of naval equipment; but, on examining the cases, I find no evidence of this imputed change of opinion. The counsel for the captors made an express distinction between *manufactured articles*, directly fitted for military use, and ordinary naval stores, such as pitch and tar, and on the validity of this distinction, they rested solely their claim, that the masts and spars, as embraced in the first class, should be condemned; and Sir Wm. Scott, in giving his judgment, declared his entire assent to the argument of the counsel, that the character of the port was immaterial, not in regard to naval stores generally, but to the particular articles that were libelled. In other words, the learned judge adopted and enforced the distinction relied on by the counsel. Copper in sheets, it seems, is generally not contraband; but it is so in a manufactured state adapted to the sheathing of ships. *The Charlotte*, (5 *Rob.* 275.)

presumption that they were intended only for civil use, so where they are destined to a port of naval equipment, the opposite presumption, that they are intended for military use, prevails to condemn them. Nor does the rule seem unjust or unequal, by which, in both cases, the probable use is inferred from the known destination.(a)

§ 14. It is clear, that, by the modern law of nations, provisions (*commeatus belli*) are not generally contraband; and it is equally certain that they may be rendered so, by their special destination and intended use. When they are destined to the immediate supply of the military or naval forces of the enemy, the aid thus meant to be given for the prosecution of the war is so direct and important, that the act of transportation is peculiarly noxious, and the penalty of confiscation is, without hesitation, applied. We have already seen that it has been decided, by the Supreme Court of the United States, that, where the real object is the supply of the enemy's forces, the voyage is illegal, even

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(a) The *Staat Embden*, (1 Rob. 26.) The *Sarah Christina*, (1 Rob. 241.) The *Maria*, opinion of Sir William Scott, (*Ibid.* 372.) The *Apollo*, (4 Rob. 158.) The *Christina Maria*, (*Ib.* 166.) The *Twee Juffrowen*, (*Ib.* 244.) The *Evert*, (*Ib.* 354.) Unwrought materials for ship building are probably subject to the same rules. Rosin is not generally contraband, but it is so when going to a port of naval equipment. *Nostra Signora*, (5 Rob. 97.) In the decisions relative to naval stores there is a defect of principle that will not escape the attentive reader. If, when they are destined to a *commercial* port, it is a just presumption that they are intended solely for civil use, it is evident that this presumption exists, in all cases, when such is their destination, *from whatever country* they may be exported, and hence, in all such cases, the presumption should avail to their protection. The only ground upon which they can be considered as generally contraband, is the mere *possibility*, opposed to the *probability*, of their application to military use; the very principle that Bynkershoek condemns as capable of an indefinite extension.

where the immediate port of destination is neutral in its character.(a)

§ 15. Nor, by the established doctrine of the English admiralty, is it, in all cases, necessary, in order to stamp upon provisions, a contraband character, that they should bear a certain destination to military use. Where the fact of such destination is highly probable, it produces the same result, and of this probability, the nature and quality of the port, to which the articles are destined, is considered not an irrational test. Where that port is a general commercial port, it will be understood, that the articles were going for civil use, although in the same port, ships of war may be occasionally constructed; but if, on the contrary, the great predominant character of the port, is that of naval construction or equipment, it will be intended, that the articles were going for military use, although merchant-ships may resort to the same port, and it is possible that the articles, after their arrival, might have been applied to civil consumption. Where it is impossible to ascertain the final application of an article *ancipitis usus*, of indeterminate use, it is not an injurious rule, that deduces, in all cases, the final use from the immediate destination.(b) The same conclusion, as to the intended and final use of a supply of provisions, may be justifiably drawn, even where the port of

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(a) *The Commercen*, (1 *Wheat*. 382.) S. C., (2 *Gallis*, 264.)

(b) Sir William Scott in *the Jonge Margaretha*, (1 *Rob.* 196.) Vide also *the Haabet*, (2 *Rob.* 182.) *The Zelden Rust*, (6 *Rob.* 93.) *The Ranger*, (*Ib.* 126.) *The Edward*, (4 *Rob.* 68.) The doctrine of Sir William Scott, in these cases, seems to have received the explicit sanction of the Supreme Court of the United States, in *the Commercen*, and certainly of Mr. J. Story, in that case and in *Maisonnette v. Keating*, (2 *Gallis*, 335.)

immediate destination is not in itself a port of naval equipment, but is so near to a port of that character that the two are, in fact, nearly identified, so that a supply, permitted to be imported into the first, could not by possibility be prevented from going on immediately, and by the same conveyance, to the other. (a) It is, however necessary to add, that the immediate destination of the articles to a port of naval equipment, or to one identified with such a port by its proximity, is not alone sufficient to produce a condemnation. It must further appear, that the provisions, from their nature and quality, were adapted to military use; since, otherwise, the presumption, that they would have been applied to that use, had their arrival been permitted, wholly fails. (b)

§ 16. In a single case, Sir William Scott asserts the doctrine, that provisions, even where they are not certainly or probably destined to military use, but the presumption is that should they arrive they

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(a) *The Zelden Rust*, ut sup.

(b) In the *Jonge Margaretha*, where the cheeses intercepted as contraband, were destined to Brest, a port notoriously of naval equipment, Sir William Scott required evidence of their fitness for naval use, and he condemned them, as it appeared by proper certificates, that they were such as were exclusively used in the French navy. In the *Zelden Rust*, similar evidence was given, and relied on by him in his judgment. By the 18th article of the treaty of 1794, between Great Britain and the United States, it was stipulated, that under the denomination of contraband, should be comprised "all arms and implements serving for the purposes of war, and also *timber for ship-building*, tar or rosin, *copper in sheets*, hemp and cordage, and generally, whatever may serve directly to the equipment of vessels, unwrought iron, and fir-planks only excepted." This stipulation, both in the articles it enumerates, and in declaring them universally contraband, goes beyond the decisions of the English admiralty, and is only more favorable in the exception, under all circumstances, of unwrought iron and fir-planks.

would be applied exclusively to civil consumption, may yet be seized on their passage to an enemy's port by the opposite belligerent ; not indeed with a view to their confiscation, but in the exercise of the milder right of pre-emption ; that is, the right of the government to purchase them at a price equivalent to their value, including a reasonable mercantile profit.(a)

§ 17. It is not denied that a seizure for such a purpose may be justified in a case of extreme necessity, where the belligerent country, making the seizure, is immediately pressed by the danger of famine ; but, during the first war of the French Revolution, the existence of the right in the extent, in which it is stated by Sir William Scott, and was then asserted by the government of Great Britain, was strenuously denied by the neutral powers of Europe, and still more emphatically by the government of the United States, and from the result of the discussions on the subject, it is not at all probable, that in any future war it will be exercised or claimed by Great Britain herself.

In April, 1795, after the treaty between Great Britain and the United States had been concluded, but before its ratifications were exchanged, the British government, by an order in council, instructed its cruisers to stop and detain all vessels laden, wholly or in part, with corn, flour, and other articles of provisions, and bound to any port in France, and to send them to such English ports as might be convenient, in order that the provisions might be purchased, on behalf of the government. Under these instructions, many American vessels

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(a) *The Haabet*, (2 *Rob.* 182. Vide also as to the pre-emption of naval stores, the *Sarah Christina*, (1 *Rob.* 237.)

were captured and taken into British ports, and their cargoes sold ; but, as the owners were not satisfied with the price they received, they demanded compensation from the British government. Their claims were submitted to the joint commission, that, by the provisions of the treaty, was authorized to determine and adjust all claims of American citizens, arising from the violation of their neutral rights ; and the commissioners, upon a solemn hearing, determined that the acts of the British government, which were the subject of complaint, were wholly illegal, and that the owners of the vessels seized, and of the cargoes sold, were entitled to a full indemnity for the injury they had sustained, not only from the loss of the foreign market, but from the expenses and other consequences of the capture and detention. This decision of a tribunal, that the British government concurred in appointing, and whose decrees it was bound to obey and execute, seems to be a final settlement of the question ; nor is there any reason to suppose, that its conclusive effect will be hereafter disputed.(a)

§ 18. An insurance upon goods, liable to confiscation, as contraband of war, if made in the belli-

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(a) 2 Wheaton's Inter. Law, pp. 195—210. The substance of Mr. W. Pinkney's very able opinion on this subject, is given by Mr. Wheaton, and merits an attentive perusal.

Other cases, usually classed with the carriage of contraband, such as the employment of a neutral ship, as a transport, in the enemy's service, or for the conveyance of military persons, or of despatches, have been already considered, under the head of Enemy's Property. This seemed to me the proper arrangement, since the effect of the illegality in these cases, is to destroy wholly the neutral character. The analogy they bear, is to the cases in which a neutral ship becomes that of an enemy, by adoption.

gerent country, whose rights are violated, it is admitted by all writers, is wholly void ; nor do I perceive any reason for doubting, that an insurance upon every other subject or interest, liable to be involved in the same penalty, is equally invalid. Hence, a policy upon the freight of the contraband articles, upon other goods, the property of the same owner, and upon the ship, when subject to condemnation, is, in all cases, an illegal contract ; for, although the penalty, to which the subject is liable, may not always be enforced in a court of admiralty, that court alone seems competent to judge of the special circumstances that may warrant a discretionary relaxation of its general rules. Nor, to avoid a policy upon the ship, does it seem to be necessary, that she should be placed in circumstances to justify her condemnation. The transportation of contraband, as viewed by the law of nations, is universally an unlawful act ; and it is for this reason, that it subjects the ship to the penalty of the loss of freight. The imposition of this penalty, it seems to me, renders the voyage prohibited and illegal ; and hence, if we are governed by analogy, an insurance of the ship, on such a voyage, cannot be sustained. The arguments of a sound policy, lead us to the same conclusion. It is impossible to deny, that a belligerent country has a real, and, in some cases, a deep interest, in preventing the transportation of contraband articles to the use of the enemy. To permit the vehicle of transportation to be insured, is to encourage the act. These reasons do not apply to an insurance upon the innocent goods of an innocent shipper, which is, doubtless, valid. He was no party to the illegal transaction, had no power to

prevent it, and, it must be presumed, no knowledge of its existence. It is, however, doubtful, whether the insurer is liable even to the owner of innocent goods, for a loss arising from the condemnation or detention, by his own government, of the carrier-ship. We have seen, that this liability exists where the detention arises from the transportation of enemy's property; but, in the case in which this was decided, the court placed their judgment expressly on the ground, that the carrying of enemies' goods, by a neutral ship, is an innocent and lawful act.<sup>(a)</sup> Where the transportation of goods, liable to capture, is unlawful, it is probable that a different rule would be adopted. In such cases, all losses, arising from the capture, may not unreasonably be considered as virtually excepted from the policy. He who insures goods by a neutral ship, knows that the goods of an enemy may be lawfully carried by the same ship, and must, therefore, guard himself against the risk, by the special terms of the policy; but he is not bound to presume, that the duties of neutrality will be violated by the carrying of contraband, and may be justly held, however general the terms of the policy, not to have assumed any risk resulting from the unlawful act. Where the shipper is innocent, it is a fair inference, that no such risk was in the contemplation of either party, when they made their contract.

§ 19. The second principal duty of neutrals, is to refrain from such an interference in the war as tends directly to relieve a belligerent power from the pressure of opposite hostilities, and the most

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(a) *Barker v. Blake*, (9 *East*, 283.) Sup. p. 533-549.



prominent and frequent instance of the violation of this duty is the breach of a blockade duly instituted and properly maintained. The right of a belligerent to invest with a naval force the ports of the enemy so as to exclude entirely the commerce of neutrals, during the continuance of the investment, is undoubted. It is true, that the exercise of this right by its obstruction of a commerce otherwise lawful, frequently operates as a serious grievance; but the grievance is one to which neutral governments and their subjects, by the law of nations, are bound to submit. Still the right, considered as it affects the interests of neutrals, is severe in its nature, and it is more especially in such cases that a court of admiralty, in judging of the validity of a capture, is bound to ascertain that the rules of law have been strictly observed, and that the rights of war have not been exceeded. It is bound to watch the exercise of a right, that in its most legitimate form is an oppressive restraint upon neutral commerce, with a peculiar jealousy, and should never permit its necessary evils to be aggravated by a lax indulgence of construction.<sup>(a)</sup> I have stated these principles nearly in the language of Sir William Scott; but it is painful to confess that evidently sound and just as they are, they were not always remembered and followed by that eminent judge in his subsequent decisions.<sup>(b)</sup>

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<sup>(a)</sup> *The Juffrow Maria Schroeder*, (3 *Rob.* 147.) *The Haabet*, (6 *Rob.* 58.)

<sup>(b)</sup> I refer to the sanction that he gave to the celebrated orders, in council of April, 1809, which he admitted, abstractly considered, were a plain violation of the law of nations, but defended on the sole ground that they were "retaliatory." *The Fox*, (*Ed. Ad. Rep.* 311.) The principle that a belligerent power has a right to retaliate upon the enemy

§ 20. The subject of blockade is of considerable extent, and the various topics that it embraces will be successively considered under the following heads of inquiry.

1. What are the facts necessary to constitute a valid blockade ?

2. By what acts is such a blockade violated ? and lastly,

3. What is the penalty for such violation ? To what subjects does the penalty extend ? And within what period of time must it be enforced ?

§ 21. The institution of a blockade is a high act of sovereignty, that from its nature must proceed, either directly from the government of the state, or from some officer to whom the authority of the state has been expressly or impliedly delegated. The com-

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by following his example, in *trampling upon the rights of neutrals*, is, in its essence, irrational, immoral and unjust. It derives no countenance from any writer of authority upon public law, and in an early stage of his judicial career, was denounced in forcible terms by Sir Wm. Scott himself. "It is monstrous, (he then said,) it is monstrous, to suppose that, because one country has been guilty of an irregularity, every other country is let loose from the law of nations, and is at liberty to assume whatever it may think fit." *The Flad Oyen*, (1 *Rob.* 142.) Yet on this "monstrous" supposition the British orders in council were solely founded. Bynkershoek, in speaking of an edict of the States General, by which they declared all ships, purchased by neutrals in the dominions of France, to be liable to confiscation, and which was issued in retaliation of a similar edict of Louis XIV., condemns, without reserve, this act of his own government, as in its operation upon neutrals, indefensibly unjust, and he lays down the luminous maxim, that "*Retorsio non est, nisi adversus eum, qui ipse damni quid dedit, ac deinde patitur, non vero adversus communem amicum.*" "Retaliation must be limited to the party who inflicts the injury, and cannot be justly extended to a common friend." (Q. J. P., lib. i., cap. 4.) It must, however, be confessed, that this judicious writer was not, on this subject, always consistent with himself; but in subsequent passages seem to have forgotten his own principle, though he nowhere controverts its truth. Vide a note of his learned translator, (*Du Ponceau's Law of War*, p. 86.)

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commander of a fleet, who is ordered to a distant station, may be reasonably presumed to carry with him, as a part of his delegated power, such a portion of the sovereign authority as the exigencies of the service on which he is employed, under the varying circumstances of the war, may seem to require. His authority in such cases is implied from the nature of the service. But where the station of the fleet is within the vicinity of the government, which is thus enabled to superintend and direct the course of operations under which it may be expedient that particular hostilities shall be carried on, a different rule seems to be applicable. It is probably, then, the duty of the commander to justify his acts when his authority is questioned, by express proof of their correspondence with the instructions of the government.<sup>(a)</sup>

§ 22. It must, however, be confessed that the language of the learned judge in the case from which these observations are extracted, renders it doubtful whether a neutral individual is ever at liberty to impeach the regularity of a blockade, otherwise valid, by questioning the authority of the commanding officer by whom it was established, or is enforced. The officer who acts irregularly is doubtless answerable to his own government; but where his acts are acts of legitimate hostility, which as such his government might have authorized, it seems not to be open to a neutral state or its subjects, under any circumstances, to dispute their validity. At any rate, it is certain, that where the acts of a commander who had established a blockade without orders, are subsequently adopted and ratified by his own government, the ratification sup-

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(a) *The Rolls*, opinion of Sir William Scott, (6 Rob. 366.)

pHes the want of an original authority and precludes all further inquiry on the part of the neutral claimant.(a)

§ 23. Whatever may be the true doctrine as to the right of a neutral to deny the validity of a blockade as established without authority, it is settled, that where the commander of the blockading squadron has exceeded his actual authority, the excess may be urged as a valid defence. Where a blockade has been declared by the government, the commander of the blockading squadron has no discretionary power to extend its limits. If he prohibits neutral ships from entering ports not embraced in the terms of the blockade he was appointed to enforce, the warning is illegal, and no penalty is incurred by the neutral master by whom it is disregarded.(b)

§ 24. It is, certainly, not necessary, by the modern law of nations, that to constitute a valid blockade, the port to which it applies shall be invested by land as well as by sea; but it is necessary, that the investment by sea shall be complete and effectual. A blockade is a naval circumvallation, intended to prevent and cut off all communication with the port that it encloses, and to cause an entire suspension of its commerce.(c) The evidence, therefore, of its legal sufficiency, is its adequacy to attain the end proposed, and this is determined by the extent of the danger that it creates, which must be such as to expose every vessel that attempts to enter or depart, to the imminent risk of

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(a) *The Rolla*, ut sup.

(b) *The Henrick and Maria*, (1 Rob. 146.)

(c) *The Vrouw Judith*, opinion of Sir William Scott, (1 Rob. 150.)

capture.(a) The propriety of this definition is affirmed or implied in many of the decisions of Sir William Scott, and, in its terms, it corresponds substantially with that which has been generally adopted in modern treaties, and particularly in the Convention of 1801 between Great Britain and Russia. As the object of this treaty was to settle the controversy that had arisen from the conflicting pretensions of neutral and belligerent powers, its provisions may be justly regarded as an authoritative and permanent declaration of the law of nations, as it was intended by the contracting parties that it should, in future, be understood and administered by their own tribunals. It follows, that a blockade that is not, in fact, sustained, or, from its nature and extent, cannot be sustained by an adequate force, but rests solely on an edict or proclamation of the belligerent power, declaring its existence, is repugnant to the law of nations, and wholly void. It is entitled to no respect or obedience from neutral states or their subjects, and no penalty can be justly inflicted for its violation. Such acts as the Berlin and Milan decrees of France, and the retaliatory orders in council of England, can never be deemed a just exercise of the rights

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(a) Grotius *De Jur.*, B. & P. lib. 3, cap. 1, § 5. Bynkershoek, *Q. J. P.* lib. 1, cap. 11. Duponceau's Translation, 82. 2 Wheaton's *Inter. Law*, p. 228-233. 1 Kent's *Com.* 5th ed. 144. The *Mercurius*, opinion of Sir William Scott, (1 *Rob.* 82, 83.) The *Betsey*, Murphy, (*ib.* 93.) The *Vrow Judith*, (*ib.* 150.) Article, § 4, of the Convention between Great Britain and Russia, declares that, in order to determine what characterizes a blockaded port, that denomination is given only where there is, by the disposition of the blockading force, with ships stationary or sufficiently near, an imminent danger of entry. The definition of a blockaded place in the treaties between the United States and Chili, (1822,) and the United States and Peru, (1830,) is "one actually attacked by a belligerent force, capable of preventing the entry of the neutral;"

of hostility ; but by whatever pretext their true character is sought to be disguised, they are, in their nature, an unjustifiable and violent invasion of the rights of neutrality, and the attempt to enforce them by the confiscation of neutral property, where redress is denied, a legitimate cause of immediate war. There is, however, little reason to apprehend that these acts of unjust aggression, by which the commerce of the United States was, during a period, nearly swept from the ocean, will be repeated in the future wars of the European powers. The temptation to injustice that our comparative weakness then offered, has ceased to exist. In future wars, the struggle of the belligerent powers will, probably, be to secure our friendship : certainly, there will be no emulation to provoke our enmity.

§ 25. There are two kinds of blockade, the first of which may be properly denominated a simple blockade ; the second, a governmental. A simple blockade, or a blockade *de facto*, is constituted merely by the fact of an investment ; a governmental requires, in addition, a public notification of the fact to foreign powers by the government declaring the blockade. This distinction is by no means nominal ; but leads to practical consequences of much importance. The existence of a simple blockade, a blockade *de facto*, must, in all cases, be established by clear and decisive evidence ; as it arises solely from facts, it ceases when they terminate. Hence the proof of the continued existence of the necessary facts, lies upon the captors. They are bound to show that there was an actual blockade at the time of the capture. But, when the blockade is governmental, the burthen of proof

is changed. The continuance of such a blockade will be presumed by the court, unless its public revocation is shown. It is the duty of a belligerent government, which has notified the existence of a blockade to notify, in the same manner, and without delay, its discontinuance. To suffer the blockade to cease, in fact, and to apply the notification again, at a distant time, would be a fraud on neutral nations. Such a course of proceedings a court of admiralty would not be justified in imputing to a belligerent country, without the clearest evidence, and hence, in the absence of such evidence, the continuance of the blockade is a necessary presumption. It is not to be understood that this presumption may not be repelled by positive proof, that the blockade had permanently ceased ; since the exclusion of such proof would enable a belligerent country to continue in force a blockade, once notified, for an indefinite period, and to confiscate the property of neutrals for its pretended violation, although the effort to maintain it by an adequate force had been wholly abandoned ; but the burthen of proving the discontinuance of the blockade is cast upon the neutral claimant, who is bound to repel the legal presumption by unequivocal evidence. It is, probably, not enough to show that the blockading ships were not in their ordinary station when the alleged breach of the blockade occurred. Their absence may have been accidental and temporary, and it is, probably, necessary to be proved that it arose from causes that, by their necessary or legal operation, dissolved the blockade.(a)

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(a) *The Neptunus*, Kuyp, (1 Rob. 170.) *The Betsey*, Murphy, (1b. 931.) *The Christina Margaretha*, (6 Rob. 62.) *The Vrow Johanna*, (2 Rob. 109.)

§ 26. It has been held by the English admiralty, that the rule, which justly obtains in Europe, in relation to voyages there commenced, that a governmental blockade must be considered to exist until its revocation has been actually notified, is not to be rigidly applied to American merchants, sending their ships from the United States; and the grounds, on which the exception is allowed, are highly reasonable. A rigid application of the rule to merchants thus distant, would have the effect of continuing the blockade on them for a much longer period than on the trading nations of Europe, by whom intelligence is received as soon as it is issued. As the distant merchant cannot have constant information of the state of the blockade, whether it continues or has been relaxed, he is permitted to send his ship conjecturally, upon the probable expectation of finding that a blockade, that had existed for a considerable time, had been broken up, and with the view of ascertaining, by a fair inquiry, whether the fact has corresponded with his hopes.<sup>(a)</sup> The importance of this exception, as affecting the question of an intentional violation of a blockade, will be hereafter seen.

§ 27. A blockade duly established, whether simple or governmental, is not raised or suspended, by a temporary removal of the blockading squadron, when the removal is occasioned by the accidents or violence of the weather. Such accidental changes must be expected to happen in every blockade, and where the absence of the blockading force is not continued, beyond the causes by which

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(a) *The Betsey*, Goodhue, (1 *Rob.* 332.) *The Spes*, and the *Irene*, (5 *Rob.* 76.) *The Shepherdess*, (*Id.* 262.)



it was produced, it is universally held, not to affect the legal existence of the blockade. On the contrary, the attempt of a neutral to take advantage of such an interval of temporary absence, is regarded as a fraud. It is considered in the light, and is subject to the penalty, of an actual breach of the blockade. (a)

§ 28. It has been intimated, in a decision of the Supreme Court of New-York, that where a neutral arrives before a blockaded port, when the blockading squadron has been driven off by stress of weather, if he is ignorant of the cause of the removal of the force, he is not answerable for a breach of the blockade, by entering or attempting to enter; (b) but this proposition, to be rendered consistent with the English decisions, must be limited to the cases in which the neutral is not chargeable with a previous knowledge of the existence of the blockade. In cases, where this knowledge is legally imputed to him, his proceeding to the entrance or mouth of a blockaded port, it will be seen hereafter, is regarded as conclusive evidence of an attempt to violate the blockade. In these cases, the temporary absence of the blockading force, although its cause was unknown to him, would certainly not exempt the neutral from the usual penalty.

§ 29. Where the blockading squadron is driven from its station, not by the stress of weather, but by a superior force of the enemy, a different rule applies. Such an event is an effectual interrup-

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(a) *The Columbia*, (1 Rob. 154.) *The Triheten*, (6 Rob. 65.) *The Hoffnung*, (1b 116.)

(b) *Radcliff v. Unit. Ins. Co.*, (7 Johns. R.) Opinion of Court, 54.

tion, operating as a legal discontinuance of the blockade.(a) Sir William Scott has lucidly stated the grounds of this distinction. When a squadron is driven off by the accidents of weather, as such accidents are known to be usual and frequent, it must be presumed that they were in the contemplation of the government when the blockade was imposed. Hence, their actual occurrence affords no presumption on which neutrals have any reason to rely, that the system of hostilities, previously adopted, will be changed. But the case is widely different, where the squadron is driven off by a superior force of the enemy. This is a material change in the relative circumstances of the war. A new course of events arises, which may lead the government to make a very different disposition of the blockading force. It, therefore, introduces a new and different train of presumptions, in favor of the ordinary freedom of commercial intercourse. The neutral merchant is not bound to foresee or to conjecture, that a blockade, thus interrupted, will be resumed. A contrary supposition is just as probable. Hence, the former blockade is justly held to have become extinct; so that on its recommencement, the same measures are necessary to bring it to the knowledge of neutral states, either by a public declaration, or by the notoriety of the fact, as were legally requisite when it was first established.(b)

Where even a portion of the blockading force is ordered away, on a different service, the blockade

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(a) *The Triheten*, (6 Rob. 65.) *The Hoffnung*, (*Ib.* 112.) *Williams v. Smith*, (2 N. Y. T. R. 1.)

(b) *The Hoffnung*, *ut sup.*, opinion of Sir William Scott, pp. 116, 117.

will be considered as wholly raised, unless the force that is left, by its ability to prevent all communications, is competent, by itself, to maintain and enforce the blockade.(a) But the blockade is not relaxed, where some of the ships are employed in chasing suspicious vessels, that had approached the port, although their absence may leave some of the passes of communication unguarded and open ; for the service in which these ships are engaged, is a necessary part of that to which they were appointed, and their absence, like that produced by a stress of weather, is justly regarded as accidental and temporary.(b)

§ 30. Although the presence of an adequate force is sufficient to constitute a blockade, it is necessary, in order to maintain it, when established, that the application of the force to the purposes intended, should be constant and uniform. As a blockade is intended to prevent all communication with the port that it encloses, it implies and requires a universal exclusion of vessels not privileged by law. Where it is improperly relaxed by the blockading force, in the frequent permission of vessels, not privileged, to enter or depart, as the irregularity necessarily tends to deceive other parties, it may be justly held to vitiate the blockade. Where some are suffered to pass, others will have a right to infer, that the blockade is raised. In a case in which this question arose, it was said by Sir William Scott, that had it been shown that ships, not privileged by law, had been allowed to enter or come out, from motives of civility, or other

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(a) *The Nancy*, (1 *Act. Ap. Ca.* 57.)

(b) *The Eagle*, (1 *Act. Ap. Ca.* 68.)

considerations, he would be disposed to admit that other parties would be justified in presuming that the blockade had been taken off. (a) It seems evident, however, that to justify this presumption, there must be repeated instances of an improper relaxation. One or two cases, in which a blockade, otherwise strictly enforced, had been relaxed in favor of particular ships, would hardly be deemed sufficient to warrant the belief, that its legal restraint had been wholly removed.

§ 31. A maritime blockade not accompanied by a military investment on land, is not construed to prohibit the conveyance of articles not contraband of war to, or from, the blockaded port, by an interior communication. The legal effect of such a blockade is only to prevent a direct communication by sea: it applies only to ships sailing from or immediately destined to the blockaded port. A legal blockade can only exist where its actual force can be applied. Hence a blockade, as an investment, is never complete, unless the belligerent power can apply its force to every point, by which a communication may be carried on. Where this universal application of its force is not practicable, there is no blockade of the quarter where it cannot be brought to bear; and where such a partial blockade is undertaken, it must be presumed that its limited operation was foreseen by the blockading state, which, nevertheless, thought fit to impose it to the extent in which it was practicable, knowing that the commerce of the port thus invested, though partially open, would still be subject to the pressure of serious difficulties. It is true, that a maritime blockade, by this construction,

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(a) *The Rolla*. Opinion of Sir Wm. Scott, (6 Rob. 372.)

is rendered imperfect ; but the imperfection arises from the physical impossibility of a more extended application of its naval force, and by this impossibility, the extent of its legal pretensions is unavoidably limited.(a)

§ 32. The cases that we have just considered, suggest an important question on which no light is thrown by the actual decisions, and which does not appear to have been solved by any of the writers on public law, namely, what are the restrictions imposed on the ordinary freedom of neutral commerce by a mere siege on land, a purely military investment of a naval or commercial port ? The writers on international law have laid down the rule, that forbids the neutral to carry any articles whatever to a place blockaded or besieged, in terms that imply a universal prohibition ; yet we have seen that a purely maritime blockade has no effect on the interior communications of the place ; and, for the same reasons that impose this limitation, it may be thought, that a purely military investment leaves the ordinary communications by sea, unrestricted and open. In other words, that the presence of the besieging power, renders unlawful only that mode of entrance, which by the

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(a) *The Ocean*, (3 *Rob.* 297.) *The Stert*, (4 *Rob.* 65.) *The Jonge Pieter*, (4 *Rob.* 83.) *In the Maria*, (6 *Rob.* 201.) the exception was held not to be applicable to goods that had been brought down in lighters through the mouth of a river under blockade, for the purpose of being shipped for exportation. Their actual conveyance through the blockaded river, was held to be sufficient, it being perfectly insignificant whether this was effected in large vessels or in small. The difference between this and the preceding cases, is that in the former, the whole transportation was by inland navigation, which was in no manner, and in no part of it subject to the blockade. Vide also the *Charlotte Sophia*, (6 *Rob.* 204, in notis.)

direct application of its force, it is competent to prevent. A more attentive consideration of the question, however, will probably induce us to modify this conclusion.

There is an important distinction between a maritime blockade and a military siege. The sole object of the blockade is, to distress the enemy by the suspension of his commerce. It does not, generally, look to the surrender or reduction of the blockaded port, nor does it imply the commission of any hostilities, which the inhabitants are necessarily required to repel. On the other hand, the object of the military siege is, to reduce the place, whether by capitulation, or otherwise, into the possession of the besieging power. It is by the direct application of force, that this object is sought to be attained, and it is only by a forcible resistance that it can be defeated. Hence, every besieged port is, for the time, a military post; for, even when it is not defended by a regular garrison, its inhabitants are converted into soldiers by the necessities of self-defence.

It follows from these observations, that, although the legal effect of a siege may not be the entire prohibition of neutral commerce with the port invested, yet, that all supplies, whether transported by sea or land, that from their nature would probably aid the inhabitants in continuing their resistance, such as clothing and provisions, would be justly deemed contraband of war, to the same extent as if destined to the immediate use of the army or navy of the enemy. To furnish supplies, even of possible utility, to a port in a state of siege, although the communication by sea may be open, is a clear departure from neutral duty. It is a

direct interference in the war, tending to the relief of one belligerent, and to the prejudice of the other.

§ 33. I shall next proceed, in the order proposed, to enumerate and define the acts, by which a blockade is held to be violated; but, as there can be no such violation where the existence of the blockade was unknown to the party who is charged with the offence, the question of his knowledge is first to be considered. The breach of a blockade is viewed, in all cases, as a criminal act. It necessarily implies a criminal intent, and to constitute this intent, a knowledge of the existence of the blockade, and an intention to violate it, are indispensable. In many cases, these must be shown by positive evidence; in some, they are an inference more or less probable, and in others, a presumption of law, that the party is not permitted to repel. Although knowledge and intention must be combined to complete a criminal intent, it is evident that the questions, in themselves, are perfectly distinct. That of the intention, can only be properly treated in connection with the facts to which it is referred. That of the knowledge, which precedes those facts, will, with most propriety, be separately considered.

§ 34. It is on this question, that a public notification of the blockade has, frequently, a decisive bearing. The object in notifying the imposition of a blockade to a neutral state is, to enable its government to communicate the facts to its own subjects; and that it is the duty of the neutral government to make this communication without delay, and in the most effectual mode, cannot reasonably be doubted. Hence, after the lapse of a suffi-

cient time, a court of admiralty in the blockading state, will presume that the neutral government has discharged this obvious and important duty, and upon this presumption will impute to its subjects the actual possession of the information which they ought to have received. Thus, the notification to the government operates, in these cases, by construction of law, as a direct personal notice to each inhabitant of the neutral country ; nor will a party to whom, on these grounds, the necessary knowledge is imputed, be allowed to contradict the legal presumption. He will not be permitted to aver his own ignorance, either by evidence that his own government had failed to make the necessary publication, or that the publication, if made, had escaped his personal notice. It is true, that the exclusion of this evidence may operate with severity in particular cases, yet it is difficult to evade the force of the reasons on which the exclusion is founded. As a general rule, the most effectual and certain mode of diffusing rapidly and generally, among neutral merchants, the knowledge of an existing blockade, is by an official communication of the fact to their respective governments ; and where a neutral government performs its duty, by a prompt and authoritative publication of the notice it receives, it is scarcely possible that the existence of the blockade should remain unknown to any member of its mercantile community. The only cases, therefore, in which it is at all probable that any hardship can be imposed on a neutral merchant, by denying him the opportunity of proving his ignorance, is where there has been a failure of duty on the part of his own government ; and in these, it is to the government that was bound, and



had failed to protect his interests, not to the belligerent state, that his complaint and demand for compensation should be, and may be, justly addressed. The custom of a public notification, in its general operation, from the promptness and certainty of the information that it gives, is highly beneficial to neutral merchants; and where a neutral state performs its duty to its own subjects, they have certainly no interest in its abolition; but a public notification, so far as the rights of the blockading state are concerned, would become an idle ceremony, were it not held to include the inhabitants of the country to which it is made, as well as its government.<sup>(a)</sup> By an opposite construction, its object and utility would be wholly defeated.

§ 35. There is another case in which, on very reasonable grounds, the party, violating a blockade, is precluded from denying his knowledge of its existence. Where a neutral vessel is intercepted on her passage with a cargo from a blockaded port, and the cargo is proved to have been shipped after the blockade had commenced, the affidavits of the master and his crew of their personal ignorance of the fact, will not be received, unless the blockade had been so recently instituted that it was probably still unknown to the inhabitants of the port when the vessel sailed. Where a blockade has existed for any length of time, and has been repeatedly enforced, it is morally impossible that the persons within the blockaded port, and especially

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(a) *The Neptunus*, Hempel, (2 Rob. 110.) *The Adelaide*, (*Ib.* 111, in notis.) *The Vrouw Johanna*, (*Ib.* 109.) *The Jonge Petronella*, (*Ib.* 131.) The observations in the text are an expansion of the argument of Sir William Scott, in the first of the above cases: my reasons for dwelling on the subject will appear in Note I.

those connected with its navigation, should be ignorant of the forcible suspension of its commerce. Hence to permit the master of a ship leaving a port thus circumstanced, to discharge himself from the offence and its penalty by his own oath, or the affidavits of his crew, would be a direct invitation to perjury and fraud. Indeed the ignorance of the master, could it be proved, would not form even an equitable defence. It could only have arisen from a fraudulent determination not to know; an obstinate exclusion of the knowledge it was his duty to have acquired.(a)

§ 36. From the decisions on this subject, and the reasons on which they are founded, I think we may safely deduce the general rule that the notoriety of the fact, that a blockade exists, at a port where a voyage is commenced, that a knowledge of the blockade would render illegal, will, in all cases, raise a presumption by which the party charged with the offence may be justly concluded. Thus, where the vessel intercepted is destined to a blockaded port, and there is clear and positive evidence that the existence of the blockade was generally known at her port of departure when she sailed, neither the master, nor his owners, nor the shippers of goods should be permitted to aver their personal ignorance of a fact which it is scarcely possible they should not have known, and, at any rate, by due inquiry, must have ascertained.(b)

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(a) *The Frederick Molke*, (1 Rob. 86.) *The Vrouw Judith*, (*Ib.* 150.) *The Adelaide*, in notis, (2 Rob. 111.) *The Hare*, (1 Act. Ap. Ca. 261.)

(b) That such is the general rule is clearly implied in the argument of Sir William Scott in the *Adelaide*, ut sup. Vide, also, the *Calypso*, (2 Rob. 298.)

§ 37. After an attentive examination of the decisions, I am not prepared to say that there are any other cases than those that have been noticed, in which the presumption of knowledge is absolute and conclusive; but there are many in which the effect of a similar presumption is to cast upon the neutral claimant the burthen of proving his own innocence. Where a blockade of a well known commercial port has lasted for a considerable time, it is highly probable, that its existence has reached the knowledge of the merchants of every country having any intercourse with the blockaded port, or those in its vicinity; and in such cases, it lies upon the party, whose knowledge of the fact would render him guilty of a violation of the blockade, to show, by satisfactory proof, that he was not apprized of its existence.(a) So, the subjects of a neutral state, to which the existence of a blockade has not been publicly notified, may yet be affected, in process of time, by a notification to neighboring powers, since such information, generally circulated in one country, must, of necessity, travel into those that are adjoining, so as to reach, in time, the knowledge of their inhabitants. Hence, although a notification does not, by its own intrinsic force, *proprio vigore*, bind any country but that to which it is addressed; yet, in a reasonable time, it affects the subjects of neighboring states with knowledge, as a reasonable ground of evidence. That is, the inference of their knowledge is so probable, as to create a presumption that can only be repelled by unimpeached and positive proof.(b)

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(a) *The Hurtig Hane*, Dahl, (3 Rob. 328.) Opinion of Sir William Scott. *The Calypso*, ut sup.

(b) Sir William Scott's opinion in the *Adelaide*, (2 Rob. 112, in notis.)

§ 38. Where there are no legal or probable grounds for imputing to the master of a neutral ship, a knowledge of the existence of the blockade, which he is charged to have violated, it lies upon the captors to establish the fact of his knowledge, by positive evidence ; and in such cases, unless it is shown that the voyage was commenced with a knowledge of the blockade, and the intention to violate it, it must appear, to warrant a condemnation, that the master had been previously warned, by a cruiser of the blockading state, not to continue his voyage to the blockaded port, and had prosecuted the voyage, in defiance of the warning. A neutral ship, proceeding in ignorance to a blockaded port, is entitled to such a notice and warning, from the blockading force, in order to render her justly liable to the consequences of a breach of the blockade ; and the notice, to be binding, must be clear and definite. Where it is so ambiguous or insidious, that it is calculated to mislead the neutral master, or where it is expressed in general terms, that embrace other ports, not blockaded, it is illegal and void. In the latter case, it is not even valid, as to the port blockaded, although included in its general language ; and in cases where the notice is irregular and insufficient, no penalty is incurred by its contravention.(a)

§ 39. Proof of the actual knowledge of the party at the inception of the voyage, as already intimated, supersedes, in all cases, the necessity of a warning ; nor is it of any importance, by what means or in what form he received the information. If the

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(a) *The Mercurius*, (1 *Rob.* 80.) *The Henrick and Maria*, (*Ib.* 146.) *The Vrouw Judith*, (*Ib.* 150.) *The Apollo*, (5 *Rob.* 286.) *The Columbia*, (1 *Rob.* 156.)

communication made to him is credible in its nature; if it is in such a form, and proceeded from such a source, as could leave no reasonable doubt in his mind as to the authenticity of the information, it is justly expected to govern his conduct, and it is at his own peril that he disregards it; he is not permitted to aver that he placed no confidence in a communication that had just claims to his belief.(a)

§ 40. Assuming the existence of a valid blockade, and the knowledge of the party charged with its violation, we are next to inquire, what are the acts, that, in the judgment of a court of prize, are considered as evidence of an intentional violation. As a blockade is designed to operate as an entire suspension of the commerce of the blockaded port, and not merely to prevent the importation of supplies, the interdiction of intercourse embraces the whole of its export, as well as its import trade, and, consequently, as a general rule, the act of egress is just as culpable as that of ingress.(b) Hence, the decisions on the subject may be properly divided into these two classes; and those that fall under the general head of a violation by ingress, will be first considered.

§ 41. To render a neutral ship guilty of a violation of a blockade, by ingress, her actual entrance into the blockaded port, is, by no means, necessary. By such a construction, the capture of the ship would only be lawful, when it had ceased to be possible, and the purposes of the blockade, as a hostile measure, would be nearly defeated. It would, in effect,

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(a) *The Tutela*, (6 Rob. 177.) *The Rolla*, (1b. 364.)

(b) *The Frederick Molke*, (1 Rob. 86.)

be limited to the export trade of the port it was meant to distress, leaving it to receive, without interruption, its usual supplies. Hence, it is universally held, that an attempt to enter the blockaded port, completes the offence to which the penalty of the law is attached. The attempt is, in the judgment of law, an actual breach. Nor in the application of this rule is the word "attempt" to be understood in a literal and narrow sense. It is not confined to the conduct of the ship when she has reached the very mouth of the blockaded port, and only the act of entrance remains to complete the voyage. It embraces the whole voyage, when that voyage is begun with a knowledge of the blockade and an intent to violate it. The offence, in such cases, is complete from the moment that the vessel quits her port of departure; and when the necessary knowledge is first imparted, during the voyage, its continued prosecution involves the crime and justifies its penalty. It is true, that the propriety of considering the entire voyage as a continued attempt to violate the blockade, has been strongly questioned; but on examination, the doctrine will be found to rest on the firmest grounds of reason and of authority. Were all vessels, destined to a blockaded port, permitted to approach the entrance of the harbor, so many would be enabled to enter, that the blockade would soon become ineffectual. Its main object, that of distressing the enemy by intercepting his necessary or usual supplies, would be defeated, and to prevent this, the rule that renders the vessels, so destined, liable to capture during the voyage, is indispensable. The same rule, we have already seen, prevails in all analogous cases without an exception. In all other cases where the ultimate

purpose of the voyage is unlawful, it renders the voyage illegal at its inception; and the liability to seizure that there attaches, continues until the voyage is completed, or until the unlawful purpose has been abandoned, or its execution is no longer practicable.(a) It would be a strange anomaly, if a voyage to a blockaded port, with the intent of breaking the blockade, were to be alone exempt from the application of this general rule, notwithstanding the contemplated act is regarded by all the writers on public law as the most noxious violation of neutral duty, and therefore fit to be restrained by the severest penalty. The objection that during the voyage there is no substantive offence, but a mere intention, that possibly may not be executed, and cannot, therefore, without a violation of principle, be justly treated as a crime, equally applies to all the cases where the illegality of the voyage arises solely from the illegality of its uncompleted purpose, and, in all, the reply that is given is equally conclusive. It is not a mere intention that the law punishes; but the commencement of the voyage is an overt act in execution of the unlawful intent; an act by which the execution of the intention is begun; and were the mere possibility that its execution may not be completed permitted to suspend the penalty, it could rarely or never be enforced, since this possibility exists until the unlawful design is fully accomplished, and the offender, in most cases, has been placed by its accomplishment beyond the reach of the law.(b)

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(a) Sup. Lec. III. § 20, 21, pp. 330-1. Lec. VI. § 30, p. 586. Lec. VII. § 7. The exceptions to the rule stated in the text, exist also in the case of a blockade. Vide post, § 63.

(b) *The Columbia*, (1 Rob. 184.) *The Betsey*, Goodhue, (*Id.* 332.)

§ 42. Although it is universally true, that the act of sailing for a blockaded port with knowledge of the existence of the blockade, and the intention to violate it, is sufficient, in law, to constitute the offence; yet the rules by which the intention of the party is determined, vary according to the character of the blockade and the nature of the voyage. Where the vessel sails from a neutral country, the inhabitants of which, in consequence of a public notification of the blockade, are chargeable with knowledge of the fact, her mere destination to the blockaded port is regarded as conclusive evidence of the criminal intent; nor, in such cases, are the master or owners permitted to aver that it was not intended to enter the blockaded port, until it had been ascertained, by due inquiry, that the blockade had ceased. A vessel has no right to commence such a voyage, unless it was known previous to her sailing, that the notification had been duly revoked by the blockading state, or there was certain intelligence that the blockade had, in fact, been wholly raised.

§ 43. The strict application of this rule is, however, modified where the vessel sails from a distant country. Thus vessels from the United States, bound to a European port under a blockade, duly notified to their own government, are permitted to clear out with a provisional destination to the blockaded port; that is, with instructions to the

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The *Vrouw Johanna*, (2 *Rob.* 109.) The *Neptunus*, (*Ib.* 110.) The *Spes* and The *Irene*. (5 *Rob.* 76.) The *Shepherdess*, (*Ib.* 262.) The *James Cooke*, (*Ed. Ad. R.* 361) *Vos & Graves v. United Ins. Co.* (1 *Caines' Cases in Error*, vii.) S. C. (2 *Johns. Cases*, 469, and *Ib.* 180.) *Yeaton v. Fry*, (5 *Cranch*, 335.) *Fitzsimmons v. Newport Ins. Co.* (4 *Cranch*, 185.) The *Nereide*, (9 *Cranch*, 440. 1 *Kent's Com.* 5th ed.) *Vide Note I.*



master not to pursue the voyage unless he should ascertain, by inquiry, either at a port of the blockading state, or at some neutral port, that the blockade had been duly raised, or, without a public revocation, had ceased in fact. The instructions, however, declaring the necessity of this previous inquiry, and the mode in which it is to be made, must be clear and positive. Even an American vessel has no right to proceed to the entrance of the blockaded port, with the view to ascertain from the blockading force whether she can be permitted to enter, and, if no such force is found, to resume and complete her voyage, without permission. An inquiry from the blockading force is only justifiable when the master, until he found himself in its presence, was ignorant that the blockade existed. In other cases, a vessel found in a situation to make the inquiry, if destined to the blockaded port, is liable, from her previous knowledge, to instant capture. A neutral merchant (such is the reasoning of Sir William Scott) has no right to speculate on the greater or less probability of the termination of the blockade, and, on such speculation, to send his vessel to the very mouth of the blockaded river or port, with instructions to the master to enter, if no blockading force appeared, otherwise to demand a warning, and proceed to a different port. A rule that would permit this, would be introductory of the greatest frauds. The true rule is that which prohibits the party who has knowledge of an existing blockade to proceed, on the pretence of inquiry, to the very station of blockade. If particular parties are innocent in their intentions, it is still a measure of necessary caution, and of preventive legal policy to hold the rule, against the liberty of inquiry, at

the very mouth of the blockaded port, to be general and without exception, since a different rule would amount, in practice, to a universal license to attempt to enter, and on being prevented, to claim the liberty of going elsewhere.(a) To this reasoning of the learned judge I confess my entire assent. The universal license to which he refers, in its natural consequences, would be a virtual dissolution of the blockade; nor can it be denied, that the right of a belligerent power to enforce a blockade, necessarily implies the right of adopting those rules of evidence by which alone it can be rendered effectual. The entire exclusion of neutral commerce is the principal object of this hostile measure, and we contradict ourselves, if, while we admit the exclusion to be lawful, we claim the exercise of a privilege, by which the right is practically annulled.(b)

§ 44. It seems a just inference from the decisions, that where the blockade has been constituted, simply by the fact of an investment, although its existence was known at the port of departure previous to the sailing of the neutral ship, she may clear out provisionally for the blockaded port; but that in this, as in the former cases, the inquiry upon the result of which, the right to complete the voy-

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(a) Opinion of Sir William Scott in the *Spes and the Irene*, (5 Rob. 80, 81.) Vide also the *Betsey*, (1 Rob. 332.) The *Posten*, (Ib. 336,) in notis. The *Shepherdess*, (5 Rob. 262. The *Little William*, (1 Act, 141.) Upon a comparison of the decisions, the attentive reader will perceive that the necessary deduction from the relaxation, in favor of American vessels is, that in respect to the vessels of European countries, where the blockade has been notified, no intermediate inquiry is allowed. Unless the right to inquire, is the distinction made in favor of American vessels, none can be said to exist.

(b) Vide Note I.

age must depend, must be made at a port of the blockading state, or of a neutral power. I see no reason to doubt that the prohibition to proceed to the mouth of the blockaded port, embraces all cases of a previous knowledge, from whatever source the knowledge may have been derived ; and that, in all its violation, is subject to the same penalty.(a)

§ 45. Other cases remain to be stated, in which the criminal intent to violate a blockade, is deduced from the existing facts, at the time of capture, and forms a presumption, that the party is *not permitted* to repel by his own denial ; although, in these, as in other cases of ingress, the excuse of necessity, when established, is doubtless to be admitted. Thus, it is held, that neutral ships, although not ostensibly destined to the blockaded port, cannot innocently place themselves in a situation that would enable them to violate the blockade at their pleasure, and with impunity. Were they permitted, on the pretence of an intention to proceed to another port, to approach so close to that blockaded as to be enabled to slip in without obstruction, whenever they choose, it would be impossible that any blockade could be long maintained. Hence, it is not unfair to hold, that the intention of the party, in such cases, to violate the blockade, is a necessary and absolute presumption. The inference of guilt may operate with severity, in particular cases ; but the severity flows from the necessary adherence to those general rules of evidence, that are essential to the protection of the rights of war.(b) It does not distinctly appear, in

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(a) Vide cases cited in preceding note, and also the opinion of the court in the *Neptunus*, *Hempel*, (2 *Rob.* 114.)

(b) *The Neutralitet*, (6 *Rob.* 30.)

the report of the case in which this decision was made, whether the parties, on whom the penalty was inflicted, were apprised of the existence of the blockade; yet it seems to be certain, that, to justify the presumption on which the court proceeded, the knowledge of the party must be admitted or proved.

There are other cases in the admiralty reports, in which neutral ships, bound by their papers to different ports, by their suspicious approximation to that under blockade, were held to be justly subject to condemnation; but it is deemed unnecessary to state these cases, since, although varying in their special circumstances, they are founded on the same general reasons, that the situation and conduct of the ships were such as to justify the presumption of a fraudulent intent, and that the exercise of the right of blockade would be rendered ineffectual, by allowing the presumption arising from these facts to be contradicted by evidence. (a)

§ 46. A neutral ship is not permitted to enter a blockaded port, even in ballast, for although an exception of this kind is allowed in the case of an egress, the reasons on which it is founded are not applicable to an inward voyage. The egress is necessary to restore the ship to the beneficial use of the owners, and can tend, in no degree, to aid the commerce that is meant to be prohibited; but there can be no necessity for sending a ship to a blockaded port, and the intention of procuring a freight, is the only assignable motive of the voy-

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(a) *The Charlotte Christine*, (6 Rob. 101.) *The Gute Erwartung*, (Ib. 182.) It appears in both these cases, that the blockade was known to the parties.

age. It is a fair presumption, that it is intended, that she shall return with a cargo, purchased or prepared in the blockaded port, not that she shall return in ballast, thus rendering the entire expedition a fruitless expense ; nor that she shall remain useless in port during the uncertain period that the blockade may continue. Nor is it admitted, in such cases, as an adequate excuse, that the object of the voyage, was to bring away property that was actually locked up by the blockade, and which there was no other mode of extricating. It can rarely happen, that other channels of communication are not open, and, in all cases, the property may be sold, and its value be remitted in money or in bills. The only adequate excuse is that of a physical necessity.(a)

§ 47. Where a neutral ship, destined to the blockaded port, but ignorant, at the time of sailing, of the fact of a blockade, receives the information during her voyage, and is duly warned not to proceed, it is not doubted, that by continuing the voyage in disregard of the warning, she is guilty of an attempt to violate the blockade, and is justly subject to the penalty of the law ; but, whether the mere declarations of the master, when detained and warned by a ship of the blockading force, of his

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(a) *The Comet*, (1 *Ed.* 32.) It will be seen hereafter, that a ship in the port may bring away goods purchased before the blockade. It seems, therefore, a harsh and questionable decision, to deny the entry of the ship in ballast for the same purpose. Where there is no act of trading during the blockade, it is difficult to see how the rights or interests of the belligerent can be affected by the previous situation of the ship that only brings away goods that are allowed to be exported. The denial, to a neutral ship, of the privilege of an entry for such a purpose, is no distress to the commerce of the enemy, but affects solely, and it may be most injuriously, the interests of the neutral.

intention to persist in the voyage, notwithstanding the warning, is to be considered as evidence of an actual attempt, justifying an immediate capture, is exceedingly doubtful. The language of Sir William Scott on this question is, that it would not be the disposition of the court, to take advantage of the hasty expressions of the master, the possible result of resentment or surprise ; that where the declaration of his future intentions was apparently idle, or not clearly indicative of a positive and obstinate determination to carry them into effect, it would be a harsh exercise of the rights of war, to press his inconsiderate language to his disadvantage, and more especially to the forfeiture of the property of others entrusted to his discretion. But that where the declaration is made in such a form, and is accompanied by such circumstances as necessarily to impress on the mind the conviction that it was his serious determination to act in conformity to the declaration, the captor is not bound to wait until he proceeds to carry the design into execution. Where the declaration of the master as proved is thus deliberate, and is accompanied by such facts, as induce the court to believe, that he really intended to carry it into effect, it supersedes the necessity of proving further acts, and is of itself a sufficient ground of condemnation.(a)

§ 48. In a case in the Supreme Court of the United States, in which it was held, that the declarations of the master, as proved, were not sufficient to establish the fact of an attempt to break a blockade after warning, Chief Justice Marshall, in giving the opinion of the court, enumerates seve-

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(a) *The Apollo*, (5 *Rob.* 289.) Opinion of Court.

ral acts, that would be justly regarded as evidence of such an attempt, and adds to the enumeration that "possibly the obstinate determined declarations of the master of his resolution to break the blockade, might bear the same interpretation;" language that plainly implies the strong inclination of his mind that such declarations, not confirmed by subsequent acts, ought to be rejected; otherwise, to express the predominance of his opinion, the word "probably" would have been used instead of "possibly;" yet it must be confessed, that the actual determination of the court seems rather to have been founded on the insufficiency of the evidence in the particular case, than on its general illegality. (a) In a case in the Supreme Court of Pennsylvania, which related to the same ship, and embraced the same facts, it seems to have been the clear opinion of a majority of the judges, that the declarations of the master during the detention of his ship, however positive and unequivocal, are evidence merely of an intention, which unless followed by some voluntary act after his release, can never constitute the offence that the law of nations describes, and to which alone its penalty attaches; (b) and certainly this opinion is fully sustained by a universal analogy in the law. This case differs materially from that we have before considered, the inception of a voyage with the knowledge of a blockade, and an intention to violate it; for there the act of sailing is a positive act in execution of the unlawful design. But where the first information of a block-

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(a) *Fitzsimmons v. Newport Ins. Co.*, (4 *Cranch*, 185.)

(b) *Calhoun v. Ins. Co. of Pennsylvania*, (1 *Binney*, 293.) Vide particularly, the opinion of Brackenridge, J., p. 315.

ade that the neutral master receives, is from the belligerent ship by which he is detained and warned, as his past voyage was wholly innocent, his declarations can only relate to a future intention, that is not, nor so long as his ship is detained, can be accompanied by any act of partial execution. It is not until he is released, and at liberty to pursue his voyage, that he can even *begin* to execute the unlawful design. The declarations of a party may very properly be received in evidence, to explain the intent of the acts to which they relate, and which they precede or accompany, but, separated from those acts, it is an abuse of language, and a violence to law, to give to mere declarations the name and character of a positive attempt. Nor is the opposite rule at all essential to a just and even prompt exercise of the rights of war. It is the duty of a neutral master, who has been duly warned, to alter the course of his voyage, as soon as he is at liberty to resume it, and to depart at once from the vicinity of the blockaded port. He has no right to linger in its neighborhood, on the pretence of a deliberation as to the course he shall pursue, thus compelling the belligerent ship, either to leave him to enter the blockaded port without obstruction, or to wait, for an indefinite time, to watch his motions. He is bound to manifest, by his immediate acts, his determination to obey the warning he had received.<sup>(a)</sup> Hence a very short delay, an interval, probably, of less than an hour, will enable

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(a) Sir Wm. Scott, in the *Apollo*, and Ch. J. Marshall, in *Fitzsimmons v. The Newport Ins. Co.*—It is to be observed, that, in the *Apollo*, the decision of the court was not founded solely on the declarations of the master. The ship was released, and, after her release, continued to hover round the coast of Dieppe, the blockaded port, and it was this fact, combined



the belligerent to determine whether the master is pursuing the course he is bound to observe, or whether the temporary detention may not lawfully be followed by a final capture. It is scarcely possible that a neutral ship, thus circumstanced, shall escape, otherwise, than by an abandonment in good faith of the voyage, that the warning she had received, has rendered illegal.

§ 49. No excuse is ever admitted for the conduct of the neutral master who persists in his voyage to a blockaded port, in defiance of a sufficient and legal warning. His misconduct may, in no degree, be imputable to his owners; yet their innocence affords no protection to their property. His acts may be a violation of their express instructions, may even amount to fraud or barratry; yet his owners will continue to be bound by their legal consequences, to the same extent, as if they had been performed under their previous sanction and authority. Indeed the rule, so far as relates to the ship and the property of its owners, is universal, that they are concluded by the acts of the master. He is their agent, and the property they have entrusted to his care, is, in all cases, responsible for his just observance of the duties of neutrality.(a)

§ 50. The entrance of a neutral ship into a blockaded port, or an undisguised attempt to enter

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with and explained by the previous declarations, that led to the condemnation. Notwithstanding, therefore, the apparent meaning of the language of Sir Wm. Scott, it is by no means certain that he meant to say, that the declarations of the master, however repeated and determined *during his detention*, would be sufficient to warrant an immediate capture.

(d) *The Shepherdess*, (5 Rob. 262.) The excuse set up and disallowed in this case was, the intoxication of the master; but Sir William Scott

may, in some cases, be justified or excused. It is justified by a license from the government of the blockading state, and where such a license has been granted, its terms, when the conduct of the neutral has been fair, will be liberally construed for his protection. Thus, where the license described particularly the course of the voyage, it was held, that the election of the master to proceed by a different course, did not render the vessel liable to capture. The substance of the license was the permission to go to the blockaded port, and the description of the route by which the port was to be reached, was deemed to be immaterial.<sup>(a)</sup> So, where a license, by its terms, only authorizes the *entrance* of the ship with a cargo into the blockaded port, it is construed to authorize, by implication, her *return* with a cargo, and this construction avails to protect her, even where the permission to enter was not derived from a license by the government, but was an unauthorized act of the blockading force. Nor is it even necessary, that this permission should be express. If a neutral ship, arriving, in ignorance of the blockade, at the entrance of the blockaded port, is suffered to pass, a permission to enter is implied, that fully protects her on her return. If the ships, stationed on

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observed, that, supposing the fact to be true, the owners are bound by the imprudence of the master, as well as by his fraud, and that were such an excuse admitted, drunkenness would always precede the violation of a blockade.

(a) *The Juno*, (2 Rob. 116.) The license was to go to Amsterdam, the blockaded port, by the Vlie passage, and was held not to be substantially violated by the ship's going through the Texel. The court, however, intimated, that a different construction would have been adopted, had the license contained a specific prohibition as to other passages, or had any special inconvenience been shown of which the licensee was bound to take notice.

the spot to keep up the blockade, omit to use their force for that purpose, it is impossible for a court of justice to say that a blockade actually exists, that binds the vessels which are suffered to enter ; and this rule prevails, even in those cases where the partial relaxation of the blockade is not of such a nature as entirely to dissolve it. Although a ship, thus returning, is released, it is by no means a necessary consequence, that the cargo will be restored, for the owners of the cargo may be guilty of a criminal violation of the blockade, even where the ship is innocent ; the owners are considered to be guilty, if their orders for the shipment of the goods were given during the blockade, and with a knowledge of its existence—or, if given before the blockade, a sufficient time had elapsed to enable them to countermand their execution.(a)

§ 51. The only excuse that is admitted for the violation of a blockade by ingress, is that of a physical necessity, arising from the immediate need of water, or provisions, or repairs, produced by a stress of weather, that left no other alternative for safety. But as, in order to cover a real design to dispose of a cargo, the pretext of a necessity is easily framed, the excuse is necessarily liable to great suspicion, and, in all cases, is justly subject to a rigid scrutiny. Hence, it is established, that the

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(a) *The Juffrow Maria Schroeder*, (3 Rob. 147,) and *The Vrouw Barbara*, *The Henricus*, and *The Venscab*. S. C. in notis, pp. 158–9. In the *Maria Schroeder*, the ship was released and the cargo condemned. There is no express decision, that a license to enter is an implied authority to return, but as such is the effect even of a constructive permission, *a fortiori*, it must be that of a license ; we have seen that this is the construction of a license to a subject to trade with the enemy, and the reasons on which this decision is founded, equally apply to a license to a neutral to trade with a blockaded port. Sup. p. 614.

evidence relied on must clearly show an imperative and overruling compulsion to enter the particular port under blockade. It is not enough, that it appears that there were existing and adequate causes to justify the ship in deviating from her voyage, to an intermediate port of necessity. It must also appear, that she could not have proceeded, without great hazard, to any other port than that blockaded, or that in no other port to which she could have proceeded, could her necessary wants have been supplied. In short, the necessity that alone can save her, when captured, from condemnation, must be evident, immediate, pressing, and from its nature, not capable of a removal by any other means, than by the course she had adopted.(a)

§ 52. A ship, in all cases, coming out of a belligerent port, is, in the first instance, liable to capture, and to exempt her from condemnation, the most satisfactory proof of an innocent intention is required to be given. It is not, however, a necessary cause of condemnation that the master was justly chargeable with a knowledge of the blockade when he commenced the voyage; for there are many cases in which the egress is innocent, although the knowledge of the master is admitted or proved. If the ship is proved to have been in the blockaded port when the blockade was laid,

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(a) *The Hurtige Hane*, Dahl, (2 Rob. 124.) Excuse, (stress of weather and want of water and provisions,) not allowed. *The Fortuna*, (5 Rob. 27.) Want of provisions and water, state of the winds rendering it impossible to go to any other port. Ship, on further proof, restored. *The Elizabeth*, (1 Ed. Ad. De. 198.) *The Arthur*, (Ib. 202.) In both, the excuse, the necessity of seeking a pilot, disallowed. *The Charlotta*, (Ib. 252,) stress of weather; excuse allowed.

she is permitted to retire in ballast, without interruption. Such an egress affords no aid to the commerce of the enemy, and has no tendency to defeat any legitimate purpose for which the blockade was established. It would, therefore, be plainly unjust to the neutral owners to deprive them of the beneficial use of the ship, during the continuance of the blockade, by prohibiting her departure.

§ 53. But, if the ship entered the port during the blockade, and her entry was in itself an act of violation, it seems that she is entitled to no protection on her return.(a) The guilt of her entry contaminates the egress, and repels the proof of her innocence, that the absence of a cargo might otherwise have afforded. In such cases, it is the return of the ship that affords the first opportunity of vindicating the law, and her offence would remain unpunished were she then permitted to escape. The offence, however, does not travel on with her for ever; but as in other cases of a criminal egress, is limited in its penal consequences to the completion of her return voyage. So where the ship, although of the number of those that were in the port when the blockade was imposed, is proved to have been purchased from the enemy during the blockade, she is justly subject to condemnation. The purchase was an act of trading, and the sale of ships is a branch of the commerce that the blockade was meant to prohibit. But where the ship was in good faith purchased and delivered, before the commencement of the blockade,

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(a) *The Frederick Molke*, (1 Rob. 86.) *The Christiansberg*, opinion of Sir William Scott, (6 Rob. 381.)

although the purchase was from the enemy, or was purchased during the blockade,(*a*) but from a neutral, who before the blockade had a valid title, the transaction is not to be impeached, and the departure of the ship in ballast, is innocent and lawful.(*b*) In neither case had the purchase any connection with the commerce that the blockade was intended to affect.

§ 54. The egress of a ship with a cargo on board, is regarded as criminal, and leads generally to a condemnation, unless it is clearly proved that the goods were, in good faith, purchased and delivered to the master, for the use of the neutral owners, before the commencement of the blockade, or before its existence was known; otherwise, the taking on board a cargo with a knowledge of the blockade, is considered a fraudulent act, and the sailing of the ship with such a cargo, a violation of the blockade.(*c*) Nor is it necessary that the whole of the cargo should be thus laden; where even a portion of the goods are taken on board after the existence of the blockade is known, the act is considered as a fraud that justifies a general condemnation.(*d*) The grounds of these decisions are, that after the commencement of a blockade, the interposition of a neutral to assist in any way the exportation of the property of the enemy, tends directly to relieve him from the distress that the blockade was meant to create. It would defeat a

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(*a*) The Gen. Hamilton, (6 Rob. 61.) The Vigilantia, (Ib. 122.)

(*b*) The Potsdam, (4 Rob. 89,) and the two cases cited above.

(*c*) The Vrouw Judith, (1 Rob. 150.) The Neptunus, (Ib. 170.) It is no excuse that the cargo was intended to be taken to a port of the blockading country. The Byfield, (Ed. Ad. R. 188.)

(*d*) The Calypso, (2 Rob. 298.)

principal object of the hostile proceeding ; consequently, after the commencement of the blockade, a neutral is no longer at liberty to make any purchase in the place with a view to exportation.(a)

§ 55. We have seen that an exception exists in favor of a neutral ship that had been permitted to enter by the blockading force ;(b) but the ground of the exception, doubtless, is, that the master, not being interrupted in his entry, had a right to believe that no blockade, in fact, existed. It is the absence of the necessary knowledge that changes the nature of the act, by removing all guilt from his intention. So, a neutral ship, whose entry into the blockaded port was lawful, is permitted to return with her original cargo, that had been found unsaleable and was reshipped during the blockade. It was held by Sir William Scott, that the same rule which permits neutral merchants to withdraw their ships, extends, with equal justice, to merchandize, sent in before the blockade, and withdrawn, in good faith, by the neutral proprietors.(c)

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(a) *The Betsey*, (1 Rob. 94.) It might be inferred from the language of Sir William Scott, in this case and in the *Frederick Molke*, that the penalty attaches in all cases where the goods are laden during the blockade ; but I am satisfied by comparing this language with his subsequent observations in the *Vrouw Judith* and the *Neptunus*, that he did not mean to be thus understood, and that it is sufficient to prevent a condemnation that the goods had in fact become neutral property by a delivery to the master before the blockade commenced ; and upon principle this must be so. If they were neutral property when the blockade began their subsequent exportation and shipment, is no interference in the commerce that the blockade was meant to interdict. It must, however, be admitted, that in the *Rolla*, Sir William Scott limits the exemption to cases in which the cargo had been delivered previous to the blockade, either on board the ship or in lighters ; but this decision, I apprehend, was partly founded on the particular nature of the trade in which the ship was engaged. *The Rolla*, (6 Rob. 371-72.)

(b) Sup. p. 678.

(c) *The Maria Schroeder*, (4 Rob. 89,) in *notis*.

§ 56. Another, and a very equitable exception, is allowed in favor of a neutral ship, that leaves the port in the just expectation of a war between her own country, and that to which the blockaded port belongs. In this case, she is permitted to depart, even with a cargo purchased from the enemy during the blockade, if the purchase was made with the funds of neutral owners, and the investment and shipment were probably necessary to save the property, in the event of a war, from a seizure and confiscation by the enemy. But it is not the mere apprehension of a remote and possible danger, that will entitle the neutral ship to this exemption. To save the vessel and cargo from condemnation, it must appear, that there was a well founded expectation of an immediate war, and, consequently, that the danger of the seizure and confiscation of the property was imminent and pressing.(a)

§ 57. The topics last to be considered are the legal penalty for the breach of a blockade, the subjects to which it extends, and the period of time within which it may be enforced.

No rule in the law of nations is more certainly and absolutely established, than that the breach of a blockade subjects all the property, so employed, to confiscation by the belligerent power whose rights are violated.(b) Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all the writings on public law ; is frequently admitted, and never denied, in treaties,

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(a) *The Drie Vrienden*, (1 *Dod. Ad. R.* 269.) *The Wassen Hundt*, (*Ibid.* 270,) in notis.

(b) *Sir Wm. Scott in the Columbia*, (1 *Rob.* 154.)



is universally acknowledged, by all governments that have any degree of civil instruction, and is known to all their subjects who have any interest to possess the knowledge. To these observations, which are substantially those of Sir William Scott, I add the opinion of another jurist of high authority and rival celebrity, that, "among the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary in the application, than that which gives rise to the law of blockade;"(a) evidently meaning to include, in the law of blockade, the penalties by which the right is enforced.

§ 58. The confiscation of the ship, where a violation of the blockade is justly imputed to the owners, or to the master acting with or without the authority of his owners, is, in all cases, a necessary consequence. The rule that makes the innocent principal, in this and similar cases, answerable for the acts of his unfaithful agent, not only civilly, but penally, to the full extent of the property with which the agent was entrusted, may seem to be severe; yet it is, in truth, necessary to the due administration of justice, and the conviction of this necessity has led to its adoption, to a greater or less extent, in every system of jurisprudence. An adherence to the rule is especially necessary in a court of prize, which has no other means of enforcing the observance of the law that it administers, than by its action on the property involved in the offence. The apparent hardship of the rule on the innocent own-

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(a) 1 Kent's Comment. 5th ed. p. 143. Anciently the penalty seems to have extended beyond the confiscation of the property. Even Vattel justifies the treatment of the master and crew as enemies by their actual imprisonment. (*Vattel*, lib. 3, c. 7, § 117.)

er is softened by the recollection that he is entitled to a remedy against a faithless agent for whatever injury he may sustain, from his fraudulent or unauthorized acts.(a)

§ 59. The goods that compose the cargo, so far as they are the property of the owners of the ship, upon the principle stated, necessarily share its fate ;(b) and even where they are the property of other shippers, as a general rule, they are involved in the same condemnation. It is only in a few cases, where the innocence of the owners is apparent and undeniable, that they are exempt. The *presumption* of law, founded on very probable reasoning, is, that the violation of a blockade is intended for the benefit of the cargo, as well as of the ship—and consequently, that it is made with the sanction, and under the instructions, of its owners ; and in all cases, where the innocence of the owners is not manifested by the papers on board, this presumption prevails to exclude the proof. Thus, the rule applies, even where the apparent destination of the ship, judging from her papers, was to a different port, and the attempt to enter that under blockade was a deviation from the regular course of the voyage. Where the only assignable motive, for such a deviation, is an intention to dispose of the cargo in the blockaded port, and by such a disposition, to promote the interests of its owners, they are not allowed to contradict the presumption, that the master, thus visibly acting for their benefit, was also acting under their secret authority.(c)

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(a) *The Vrouw Judith*, ut sup. *The Mars*, (6 Rob. 87.) Opinion of Sir William Scott.

(b) *The Columbia*, ut sup.

(c) *The Alexander*, (4 Rob. 93.) *The Adonis*, (5 Rob. 256.)

§ 60. The only cases in which the innocence of the owners of the cargo is allowed to protect their property from the penal consequences of a breach of blockade, are cases of a supervening illegality ; cases, in which it is shown, that at the inception of the voyage, the owners stood clear, even from a possible intention of fraud ; and this fact is established by proofs, found on board at the time of capture.(a) Thus, where the illegality consists in the misconduct of the master, in attempting to enter a blockaded port, if it is certain, that when the voyage commenced, the existence of the blockade, neither was, nor could have been known, at her port of departure, the owners of the cargo could not possibly have contemplated a breach of the blockade. Hence, the illegality, although it prevail to condemn the ship, will not be imputed to their prejudice.(b) There is no general or necessary relation of principal and agent between the owners of the cargo and the master of the ship, and where their innocence is certain, the existence of this relation, in order to justify the condemnation of their property, will not be presumed.

§ 61. So also, in a case of egress, the ship may be subject to condemnation, and yet the goods, although laden during the blockade, from the certain innocence of their owners, may be restored. The owners are deemed to be innocent, if it is clearly shown, that their orders for the shipment of the goods were given to their agents in the blockaded port before the blockade existed, or was known to exist, and that, after the blockade was known to them,

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(a) *The Exchange*, (1 *Ed. Ad. R.* 43.)

(b) *The Mercurius*, (1 *Rob.* 80.)

they could not, by any diligence, have countermanded their orders in time to prevent their execution.(a) It is true, that, in this case, the agents, in shipping the goods, act with a knowledge of the blockade, and by their wrongful act, the owners, their principals would seem to be bound; but in the particular case, an equitable exception is allowed in their favor from the strict rules of law. It is considered that the agents of foreign merchants in the enemy's country, where the port in which they reside, is in a state of blockade, by no means stand, in the same relative situation, as other agents. Their interests are not only distinct from, but, in truth, are opposed to those of their principal. Their interest is to fulfil the commission, at all risks, as rapidly as possible, not only with a view to their own private advantage, but for the public benefit of their country, at that time laboring under a particular pressure, as to the exportation of its produce. These considerations appeal strongly to the candor of the court, not to hold an employer too strictly bound, on mere general principles, by the acts of an agent, who may be governed by motives of private interest wholly at variance with the real interests of his principal.(b) The force of this appeal, and the obligation that it imposed, were acknowledged by Sir William Scott in the favorable exception they led him to establish.

§ 62. In closing this subject, it is proper to observe, that in all the cases in which an exception is allowed in favor of the cargo, the nature of the

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(a) *The Neptunus*, Knyp, (3 Rob. 173.) *The Adelaide*, (1b. 281.) *The Manchester*, (2 Act.)

(b) *The Neptunus*, (3 Rob. 177.) Opinion of Sir Wm. Scott.

evidence is such as to exclude any possible imposition on the mind of the court. The facts speak for themselves, so that, by a mere comparison of dates, the court is enabled to satisfy itself of the pure intentions of the owners.(a) It is this observation that reconciles these cases with the decisions, in which, the proof of the innocence of the owners is held to be justly excluded; for this exclusion is founded on the hazard of deception, from the necessary uncertainty of the evidence offered.

§ 63. To justify a capture for the violation of a blockade, or the attempt to violate it, the offence must continue to exist at the time of seizure. In technical language, the ship must be then *in delicto*. In cases where the ship has violated the blockade by egress, the *delictum* continues during her whole voyage, until she has reached her final port of destination. Until then, as the offence consists, not in a mere attempt, but in an actual breach, no change of circumstances or subsequent repentance can efface its guilt. It is not cancelled by a mere interruption of the voyage, such as the stopping of the ship at an intermediate port, either from necessity or design; when she resumes her voyage, she becomes again subject to the penalty of the law.(a) But when the ship sails for a blockaded port, with a knowledge of the blockade and the intention to violate it, although the offence is so far complete as to justify her immediate capture, yet as it exists only in an attempt, the *delictum* does not of neces-

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(a) *The Exchange*, ut. sup. Opinion of Sir Wm. Scott.

(b) *The Welvaart*, (3 *Rob.* 128.) *The Juffrow Maria Schroeder*, (3 *Rob.* 147.) *The Gen. Hamilton*, (6 *Rob.* 61.) *Bynkershoek Quæst. J. P. lib. 1, cap. 11.*

sity continue during the whole of her subsequent voyage. If previous to her capture, the blockade had ceased to exist, (a) or the master from the information of a ship of war of the blockading state, had just grounds for believing that such was the fact, (b) or had altered his destination, with the intention of not proceeding, at all, to the blockaded port, (c) the offence no longer exists, and that which had existed is no longer punishable. To constitute the offence, three circumstances must be found to co-exist. The fact of a blockade, the party's knowledge of its existence, and his intention to violate it, and in each of the above cases, an indispensable circumstance is wanting. The *delictum*, therefore, at the time of capture, had wholly ceased, and both ship and cargo will be restored.

§ 64. Insurances upon voyages rendered illegal by the actual or attempted violation of a blockade, require no special remarks. It is sufficient to say, in general terms, that an insurance made in the country of the blockading state, is necessarily invalid, from the time that the subject insured, as involved in the offence of a breach of blockade, becomes liable to confiscation, and that the invalidity continues so long as this liability exists. Where a ship is insured upon time, although the contract may not be void in its origin, it may be rendered so, by the contravention of a blockade, for the particular voyage to which the legal penalty attaches; but where the voyage has terminated, and the liability to capture no longer exists, it seems probable that the obligation of the

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(a) *The Lisette*, (6 *Rob.* 387.)

(b) *Neptunus*, *Hemple*, (2 *Rob.* 114-15.)

(c) *The James Cooke*, (*Ed. Ad. R.* 263.)

contract would be held to revive. The effect of a supervening war, by which the property insured is rendered that of an enemy, according to Lord Ellenborough, is to exonerate the insurers from all the risks of the policy, during the continuance of the hostilities.(a) This language plainly implies, that the contract is not annulled, but merely suspended, by the operation of the war, and that the return of peace, should the policy not have expired by its own terms, will restore its life and obligatory force. The doctrine seems in itself just and reasonable, and in cases where the policy is not so entire as to preclude any separation of its risks, may be applied, with equal justice, to every case of a supervening illegality : that is, an illegality arising after the commencement of the risks.

It evidently appears, from some of the more recent decisions in the courts of common law in England, that an insurance on a voyage, in contravention of a blockade, is deemed to be illegal and void, even where the insurance is effected in a neutral country, on the ground that the voyage is prohibited by the law of nations.(b) The opposite rule seems, if not to be established, to have been assumed in the United States ; but it is to the last general division of our subject, that the discussion of the question properly belongs ; and I therefore defer to its appropriate place an examination of the cases to which I have alluded.

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(a) *Brandon v. Curling*, (4 *East*, 410.) Sup. p. 472-3.

(b) *Harratt v. Wise*, (9 *B. & C.* 712.) *Naylor v. Taylor*, (*Ib.* 718.) *Medeiros v. Hill*, (8 *Bing.* 231.)

## PROOFS AND ILLUSTRATIONS.

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### NOTE I.

P. 666, § 42. In a note of the learned reporter to the case of *Olivera v. Union Ins. Co.* (3 *Wheat.* 196,) it is stated that the government and courts of the United States have, among other doctrines, constantly maintained, that a mere notification to a neutral minister shall not be relied on as affecting with knowledge of the actual existence of the blockade, either his government or its citizens, and that a vessel cleared or bound to a blockaded port shall not be considered as violating in any manner the blockade, unless on her approach towards such port, she shall have been previously warned not to enter it; in other words, that a neutral ship has in all cases the right to proceed to the very station of the blockading force, for the purpose of ascertaining whether the blockade in fact exists, and is never guilty of an attempt to violate the blockade, unless she disregards the warning there received; and if this statement be correct, it follows that all the decisions of Sir William Scott, relative to the legal effect of a notification to foreign governments, the effect of the presumed or actual knowledge of the party, in rendering a voyage to a blockaded port illegal at its commencement, the prohibition of inquiry at the entrance of the blockaded port, and in truth, the liability of a neutral ship to capture for the violation of a blockade, by ingress, in any case whatever, except where she is proved to have pursued her voyage in defiance of a sufficient warning, are repugnant to the law of nations, as understood and maintained by the United States. If this repugnancy exists, such is its importance and such its extent, that in the event of a future war, in which Great Britain shall be engaged, while the



United States are neutral, if both governments persist in their pretensions, it must lead inevitably to collision and war. It is therefore obvious, that the question has a permanent interest, and merits an attentive examination.

The learned reporter refers to certain documents published in the Appendix to the same volume, as evidence of the conduct of the American government, and as evidence of the law as interpreted by our courts, to the following cases: *Williams v. Smith*, (2 *Caines*, 1.) *Vos v. United Ins. Co.* (1 *Caines' Cases in Error*, vii.) *Liotard v. Graves*, (3 *N. Y. Term R.* 226.) *Calhoun v. Ins. Co. of Pennsylvania*, (1 *Binney*, 293.) *Fitzsimmons v. Newport Ins. Co.* (4 *Cranch*, 185.) *Sperry v. Delaware Ins. Co.* (2 *Wash. C. C. R.* 243.) *King v. Same*, (*ibid.* 300,) and *Radcliff v. United Ins. Co.* (7 *Johns.* 38.) Upon an attentive consideration of both these classes of authority, I am constrained to think that, with the exception of two decisions in New-York, to which I shall hereafter advert, they are very far from sustaining the positions for which they are cited. In this conclusion I am justified by the authority of Chancellor Kent, who says, that "the judicial decisions in England and in this country, have not only given great precision to the law of blockade, but are distinguished for their general coincidence and harmony in their principles," (1 *Kent's Com.* (5th ed.) 149,) and who in his own admirable summary of the law on this subject, refers, with distinct approbation, to all the decisions of Sir William Scott, on which I rely, without an intimation, that any of them, with the exception that I have stated, have been questioned in the United States.

Of the state papers, to which the learned reporter refers, it is sufficient to say, that, while they clearly prove that the American government has firmly maintained the doctrine, that, to constitute a valid blockade, the presence of an effective force is, in all cases, indispensable, even where the blockade has been publicly notified, they contain no denial of the doctrine, that neutral states and their subjects are affected with knowledge, by a previous notification, when the blockade in fact exists, and is duly maintained. Still less do they contain an assertion, that a neutral ship has the right, in all cases, to proceed to the station of the block-

ading force, and that it is only by a warning there received, that her attempt to enter can be rendered unlawful. On the contrary, the Secretary of the Navy, in his instructions to the commander of an American squadron, in the Mediterranean, at that time employed in the blockade of Tripoli, expressly directs him to capture and send in for adjudication, every vessel that should attempt to enter the port with a knowledge of the existence of the blockade, and only to *warn those* attempting to enter without such previous knowledge. It is true, he also directs the officer not to consider the communication that had been made of the blockade to neutral powers, as an evidence that every vessel attempting to enter, had previous knowledge of the blockade; but this relaxation of the general rule, in favor of neutrals, by our own government, is widely different from a denial of its existence, when asserted by another; (*R. Smith, Secretary of the Navy to Com. Preble, Feb. 4, 1804, 3 Wheat. Appendix, 10;*) and this leads me to an observation, that appears conclusive. There is no evidence that the condemnation of American ships in the English courts of admiralty, on the ground of their *constructive* knowledge of an existing blockade, of which many instances must have occurred, was ever made a subject of complaint by our own government; and we may regard it as certain, that, had the sentence of condemnation in these cases been deemed unlawful, our government, jealous as it has always been of the rights of neutrality, would not have been silent.

It has been intimated, that the treaty of 1794, between Great Britain and the United States, has introduced and sanctioned a more definite rule than that, which results from the decisions of the English admiralty, and that this rule is, the universal necessity of a previous warning; but the provisions of the treaty, when examined, will be found to lead to a very different conclusion. The 18th section of the treaty, is in the following words: "And whereas it frequently happens, that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed, that every vessel so circumstanced, may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice,

she shall again attempt to enter, but she shall be permitted to go to any other port or place she may think proper."

In the case of the *Columbia*, (1 Rob. 156.) the counsel for the claimant relied on this article of the treaty, as rendering a warning necessary in all cases, but Sir William Scott replied, that the terms of the treaty plainly required a previous warning only as to vessels that had sailed without a knowledge of the blockade—and what is more material the Supreme Court of the United States, in the case of *Fitzsimmons v. Newport Ins. Co.* (4 Cranch, 200.) adopted the same construction. Indeed, the language of the treaty is too explicit to admit of a different interpretation. The rule therefore, that the treaty established, instead of being novel, or more definite, is in perfect harmony with the decisions of Sir William Scott. The terms of the treaty require a previous warning, only when the ship, when detained, is ignorant of the fact of the blockade, and they admit, by a necessary implication, that in all cases of previous knowledge the ship is liable, without warning, to instant capture. The result is that not only is there an entire absence of evidence, that the American government has constantly maintained that "a vessel cleared or bound to a blockaded port shall not be considered as violating in any manner, the blockade, unless, on her approach towards such port, she shall have been previously warned not to enter it," but there is positive evidence, that the rule which limits the necessity of a warning, to cases of actual ignorance, has been solemnly recognized and established.

The positions of the learned reporter will be found to derive as little support, from any decisions of the American courts, that are justly entitled to authority, as from the conduct of the American government.

In the case of *Williams v. Smith*, (2 Caines, 1,) the blockade had in fact been raised a few days before the vessel arrived off the port, and the whole extent of the decision was, that there must be an actual existing blockade to render it unlawful for the neutral to enter; and for this construction of the general language of the court we have the positive authority of the same court in the subsequent case of *Radcliff v. U. Ins. Co.* (7 Johns, 55.)

The substance of the decision of the Supreme Court of the United States in the case of *Fitzsimmons v. The*

*Newport Ins. Co.* is stated in the text (§ 48,) and has really no bearing on the questions we are now considering. It is true that Ch. J. Marshall, after stating that "sailing for a blockaded port knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has therefore been adjudged a breach of the blockade, from the departure of the vessel," declines to give any opinion as to the propriety of these decisions; but, that the validity of the rule which they establish was not meant to be impeached, we have the clearest evidence in subsequent cases.

Thus in the *Maryland Ins. Co. v. Woods*, (6 *Cranch*, 29, *Opinion of Court*, p. 48,) it is distinctly admitted that where a vessel sails to a blockaded port, with a knowledge of the blockade, she is bound to make inquiry at a neighboring port, and has no right to inquire of the blockading squadron; and the rule was held not to be applicable to the particular case, only, in consequence of special orders, given by the British government, relative to blockades in the West Indies. It is a necessary consequence of this decision, that where the vessel sails with a knowledge of the blockade, and with the intention of proceeding at once without intermediate inquiry to the blockaded port, the voyage is unlawful at its commencement. And the previous case of *Yeaton v. Fry*, (5 *Cranch*, 335,) is conclusive to show that the rule was thus understood by the court. In that case the policy contained an exception of the risks of blockaded ports, and it was held by the court, that, under such an exception, the underwriters are discharged as soon as the vessel commences her voyage, for a blockaded port, with a knowledge of the existence of the blockade, because, from that time, the risk of breaking the blockade is incurred. In other words, because from that time the vessel is lawfully subject to capture.(a)

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(a) In the case of the *Nereide*, (9 *Cranch*, 440,) Mr. J. Story admits the rule to be established that the act of sailing with the intent to break a blockade, is deemed a sufficient breach to authorize confiscation. I have not referred to this case as a positive authority because the opinion was that of an individual judge, and was not delivered by him in the name of the court.

The case of *Calhoun v. Ins. Co. of Penn.*, (1 Binney, 293,) is the same in its facts and in the decision as that of *Fitzsimmons v. Newport Ins. Co.* It requires no comments.

In the case of *Sperry v. Del. Ins. Co.* (2 Wash. C. C. R. 243,) it must be confessed, that Mr. J. Washington expresses strong doubts as to the propriety of the decisions of Sir William Scott, by which a neutral vessel, sailing to a port known to be blockaded, with instructions to make inquiry from the blockading force, is considered to be guilty of an actual breach of blockade; but the actual decision of the court was founded on the innocence of the instructions to the master, in the particular case, as not involving a violation of the general rule. Of the propriety of this decision we have the strongest evidence in the fact, that the condemnation of the ship to which the controversy related (the *Little William*) was subsequently reversed by the Lords of Appeal, and on the very grounds taken by Mr. J. Washington, (1 Act. 141.)

The case of *King v. The Del. Ins. Co.*, (2 Wash. C. C. R. 300,) will be found on examination to be wholly irrelevant to the purpose for which it is cited. It merely decides what is denied by none, the necessity of the presence of a sufficient force, to constitute a legal blockade.

The case of *Radcliff v. U. Ins. Co.*, is more material, not indeed, as giving any support to the positions of the learned reporter, (for the only point decided was that a legal blockade is not interrupted by reason of the blockading squadron being blown off from its proper station) but as containing, in the opinion of Ch. J. Kent, a distinct recognition of the soundness of those decisions of the English admiralty that we are considering. He admits that the neutral is justly deemed *in delicto*, who has notice of the existence of the blockade, by means of a previous notification to his government, or by an actual or constructive notice to himself.

The only cases that remain to be noticed, are those of *Vos v. The United Ins. Co.*, (2 Caines' Cases in Error, vii.—and 2 Johns. Cases, 469,) and *Liotard v. Graves*, (3 Caines, 226,) and the decision in these, it cannot be denied, if admitted to be law, would sustain the doctrine of the

learned reporter in its fullest extent. In the first of these the New-York Court of Errors decided that a neutral ship, destined to a blockaded port, with an actual knowledge of the blockade, and an express intention to violate it, is not liable to capture during the voyage, on the ground that until her arrival at the very entrance of the blockaded port, there can be no attempt to violate the blockade, but a mere intention. To this reasoning a sufficient reply will be found in the text, and to admit its force, would be to contradict all the decisions both in England and in the United States, of the courts of common law, as well as of the admiralty, in which a voyage is held to be illegal at its commencement, by reason of the illegality of its ultimate purpose. As this decision of the Court of Errors was on a question that exclusively belongs to the law of nations, it is not to be considered as evidence, for reasons that have already been stated, of the existing law, even in the State of New-York. The case of *Liotard v. Graves* is a mere reiteration of the doctrine in *Vos v. The United Ins. Co.*, and was founded on the authority of that decision. It must therefore share its condemnation. It is unnecessary to detain the reader with any further observations. It is certain that the only tribunal in the United States, that has the right to speak with authority on questions of this nature, the Supreme Court of the United States, has never maintained any doctrine, at all, inconsistent with that of the English admiralty which I have adopted in the text ; but that, on the contrary, its decisions, so far as they have gone, entirely coincide with those of Sir William Scott. I conclude with referring to the authority of Chancellor Kent, a reference which many readers may be disposed to think might supersede of itself the necessity of this long discussion. He expressly says, that a notice to a foreign government, is a notice to all the individuals of that nation, and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people ; and he admits the rule to be established, that where a neutral ship sails for a blockaded port with a knowledge of the blockade, actual or constructive, and an intention to violate it, the offence is so far complete as to authorize her immediate capture—and as evidence of the understanding of our own

government he refers to an ordinance of Congress of 1781, which goes to the full extent of the English rule, by making it lawful to take and condemn all vessels of all nations destined to a blockaded port. (1 *Kent's Com.*, 5th ed., p. 147—151.)

## ILLEGAL INSURANCES.

## BREACH OF NEUTRALITY.

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### LECTURE VIII.

#### CONTENTS.

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§ 1. If the rule that prohibits to neutrals any trade with the enemy, during the war, from which they were permanently excluded in time of peace,



is to be considered as a component part of the law of nations, it evidently rests upon the same principle as the interdiction of trade with a blockaded port : namely, that the act of the neutral has a direct tendency to relieve the belligerent country, with which he trades, from the pressure of existing hostilities. It is presumed, that it is only the pressure of the war that opens the trade, and that, to give relief from this pressure, is the necessary effect of neutral interference. It is doubted by none, that where neutrals, by a special indulgence, are permitted to engage, during a war, in a commerce of the enemy, that is purely national, and from which foreigners, as such, are excluded in war, as well as in peace, the property so employed is necessarily impressed with a hostile character. It shares the character of the commerce into which it is incorporated.(a) But the rule we are considering, goes much further. It asserts, that where a commerce, that, in time of peace, was a national monopoly, is thrown open by the enemy, in time of war, to all nations, without reserve, by a general, and on its face, a permanent regulation, neutrals have no right to avail themselves of the concession ; but that their entrance into the trade thus opened, is a criminal departure from the impartiality they are bound to observe.(b) It has been the general policy of the European powers, to confine exclu-

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(a) *The Princessa*, (3 Rob. 52.) *The Anna Catharina*, (4 Rob. 107.) *The Rendsborg*, (*ib.* 121.) *The Vrow Anna Catharina*, (5 Rob. 15.) 2 Wheaton's Rep. Appen. p. 29. Sup. pp. 450-1.

(b) In *the Ebenezer*, (6 Rob. 255,) a French regulation, opening the coasting trade, was declared, in terms, to be permanent ; but Sir William Scott said, that the court would not act on the credit of such declarations, but would adhere to its own principle, that the trade was unlawful.

sively to their own ships and subjects, the trade between their own ports, and between the mother country and its colonies ; consequently, if the rule in question is an admitted principle in the law of nations, when neutrals engage in the coasting or colonial trade of a belligerent state, which is first opened to them during the war, all the property so employed is justly liable to confiscation, by the opposite belligerent. But it is far from being true, that the rule is an established or admitted principle. It was, indeed, enforced, in a modified form, by the English courts of admiralty, during the wars of 1793 and 1801, with great severity, and the confiscation of a vast number of American ships, with valuable cargoes of colonial produce, was a principal fruit of their decrees ; but these proceedings drew from the government of the United States, an earnest and energetic remonstrance. The doctrine that they asserted, so far from being admitted, as sanctioned by the law of nations, was rejected and denounced by our government, as a modern and violent innovation, unjust in its principle, and ruinous in its application.(a) From the grounds then assumed, on full deliberation, and maintained, with signal ability, there is no reason to believe that the government of the United States will ever depart. It is, therefore, a question of much interest, whether the English rule can be justly deemed a part of the general and permanent law of nations, or is to be regarded as an interpolation, that the government of a neutral state, anxious to protect the rights and interests of its citizens,

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(a) Mr. Munroe's letter to Lord Mulgrave, Sept. 23, 1805. Mr. Madison's letter to Messrs. Munroe and Pinckney, May 11, 1806.

is bound to resist. It is my deliberate conviction, that the latter is its true character ; and the grounds of this conviction, I shall attempt, briefly, to explain.

§ 2. The rule in question is not sanctioned by authority, or by any real evidence of an ancient or general usage. 1. Not even an allusion to its existence is to be found in any writer on public law previous to the year 1793. It is true that most of these writers have treated the law of capture in a hasty and superficial manner ; but of the judicious Bynkershoek this cannot be truly said. His elaborate treatise on the rights of war was intended to exhaust the subject, and his silence as to the illegality of a trade into which neutrals are admitted in time of war, but from which they are excluded in peace, is conclusive to show that no rule declaring the illegality, was then known or conceived to exist. 2. The evidence of a corresponding usage will be found, on examination, to be very deficient and unsatisfactory. It is, indeed, asserted, that, by an ancient rule generally adopted and enforced by the powers of Europe, the trade of neutrals between the ports of the enemy during a war was strictly prohibited, and the property so employed liable to confiscation ; and this assertion is attempted to be proved by a reference to the provisions of certain treaties in the seventeenth century, between Great Britain and other European powers. Thus the treaties between England and Holland, of 1668 and 1674, contained express stipulations, giving to each party the liberty to trade between the ports of the enemy in the same country during a war ; and it is said to be a fair, if not a necessary inference, that the liberty thus given was a relaxation of an existing rule by which the trade was

prohibited. But there is the clearest proof that this inference is groundless. We have the positive testimony of the British statesman who negotiated these treaties, that these provisions were considered by him, not as altering, but as declaratory of, the pre-existing law.<sup>(a)</sup> It is, doubtless, true, that Holland asserted the opposite rule; but its denial by England conclusively proves that it was not an admitted or established principle. The argument, however, founded on these treaties, is still more effectually repelled, by the opposite stipulations of a subsequent treaty, in which Denmark on the one side, and England and Holland on the other, were the contracting parties. This treaty was concluded in 1691, during a war against France, in which England and Holland were allied, and Denmark was neutral. It prohibits in terms the transportation of goods on board Danish vessels from one French port to another—a prohibition useless and nugatory, if such voyages were known to be interdicted by the existing law or practice of nations. The prohibition of a law, unless its sole object is to impose an additional penalty, is always construed as evidence that the act prohibited was previously lawful. The permission of an act is only evidence, that its legality was regarded as doubtful. In the present case, even the weakest inference is sufficient to disprove the existence of a known and established usage.

The French ordinances of 1704 and 1744, it has been intimated, are founded on the basis of the rule in question, and imply its existence and legality; <sup>(b)</sup> but these ordinances go much further; they

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(a) Sir William Temple's Works, 313.

(b) Valin's Comment. 248, 250. 1 Kent's Comment. 82.

confiscate neutral ships, having enemy's property on board, or any of the manufactures or products of the enemy's country, or sailing from an enemy's port to any other port than one of their own nation. In short, they prohibit all the commerce of neutrals with the enemy, except in a direct trade, and in their main provisions, instead of being evidence of the existing law, are subversive of its best established principles. They, indeed, afford a striking proof of that injustice towards neutrals of which the government of France has too often been guilty; but in a controversy, relative to the rights of neutrals, have no claim to authority. 3. It is admitted by all that the records of the English admiralty afford no evidence of the condemnation of neutral ships, as engaged in the colonial or coasting trade of the enemy, until the war of 1756, and this admission is alone sufficient to refute the allegation of the antiquity and general reception of the rule. The rule as then enforced was certainly novel; but it is not necessary to deny that, if it was then submitted to by the neutral nations whose interests were immediately affected, was constantly maintained by England, during subsequent wars, without complaint or remonstrance from the other powers of Europe, and was substantially the same as that adopted in 1793, it may be justly considered as having become incorporated, by general consent or acquiescence, into the national law of Europe. But the evidence is, that the rule when first introduced, instead of commanding a ready acquiescence, encountered a strenuous resistance;—that, during the American war, the only subsequent war that intervened, instead of being maintained by the British government, it was by its highest

tribunal *explicitly* renounced and abandoned ; and, finally, that the rule, as originally enforced, so far from being substantially the same, differed widely from that subsequently adopted. So far as relates to the coasting trade, the rule of 1756 merely prohibited the trading of neutral ships on freight between the ports of the enemy, the transportation of enemy's property from one of his ports to another ; and the penalty, which in these cases was then inflicted, was not the confiscation of the ship, but only the forfeiture of the freight. It is true that in the war of 1756, many Dutch ships, engaged in the colonial trade of France, were condemned with their cargoes ; but the sole ground of the condemnation appears to have been that the commerce in which they were employed was strictly national, and that they had become, by adoption, enemy ships. At no period of that war did France abandon the principle of her colonial monopoly, or the system arising out of it. Hence a neutral ship, found in the prosecution of that trade which, under the existing laws, could be only a French trade, open only to French vessels, became, or to speak more correctly, was legally presumed to be, a French vessel. This doctrine differs essentially from that on which the rule of 1793 was founded and vindicated, and which I shall next proceed to examine.

§ 3. As the rule of 1793 derives no support from previous authority or usage, so it will be found, if I mistake not, to be quite as indefensible on principle ; or defensible only on grounds, that, if admitted to be just, would subject the whole commerce of neutrals to the mercy of the belligerent powers.

It is asserted, that neutral nations, as they are permitted to enjoy the whole of the trade to which

they were entitled in time of peace, can sustain no injury by their exclusion from that which is first opened to them by the pressure of a war: they are merely debarred from a benefit they had no right to claim or expect; but the assertion is wholly groundless, and the apparent equity of the rule, that limits them to their accustomed trade, certainly delusive. No rule can be just that is not equal, and the equality here is merely nominal. If it be just, that neutrals should be limited, in time of war, to the trade they had been accustomed to enjoy in time of peace, they should be permitted to enjoy the whole of that customary trade, in the whole of its customary extent. Their rightful traffic in peace should be the criterion and measure of their rightful traffic in war. But how widely different is the fact! A maritime war annihilates at once all their trade in articles—a copious list!—that are, or may become, from their destination, contraband of war. It destroys, in effect, all their carrying trade in the transportation of enemy's property. The vexatious delays and expenses that are certain to result from the exercise of the belligerent rights of visitation and search, are alone a serious obstruction to their commerce; and, above all, when on one side, there is a large preponderance of naval force, they may be excluded from many, perhaps all, of the principal ports of the opposite belligerent, the ports of an entire country or nation, by the adoption of an extended system of rigorous and continuous blockade. The pretence, therefore, that they have no right to complain, since they retain their accustomed trade, is evidently fallacious, and the rule, that this pretext is alleged to justify, partial and unequal. The rule prohibits abso-

lutely any extension of their accustomed trade, but provides no security for its actual enjoyment. By the operations of the war, that trade is certain to be greatly abridged. In no event, is it permitted to be enlarged. Hence, to deny to neutrals the right of entering into the new channels of commerce that the necessities of the war may open ; to require them to submit to the numberless restraints and inevitable losses that the war must produce, while they are precluded from seeking an indemnity in the countervailing advantages that the war itself may offer, is to inflict upon their commerce a certain and grievous injury—an injury of such extent and magnitude, that the right of a belligerent power to inflict it, can only be established on the clearest evidence. The principle from which the right is made to flow, must be incontestable ; the deduction, necessary and inevitable.

§ 4. In his eloquent vindication of the existence of the right, Sir William Scott is far from asserting that there can be no extension of the trade of neutrals with the enemy, during a war. He is far from considering the rule, that forbids such an extension, as universal, so that in every war, each of the contending parties has an equal right to enforce the prohibition. The reasons that he assigns in support of the rule, necessarily imply that the right depends for its existence on the peculiar character and circumstances of the war, the relative strength and power of the parties ; and hence that its legitimate exercise must be confined, in all cases, to a single belligerent. I shall give the substance of his argument, relative to the colonial trade, the most important branch of the inquiry, nearly in his own language. What, he inquires, is the co-



lonial trade, generally speaking? It is a trade generally shut up to the exclusive use of the mother country, to which the colony belongs, and this for a double purpose. The one, that of supplying a market for the consumption of native produce; the other, of furnishing to the mother country the peculiar commodities of the colonial regions. And to these two purposes of the mother country, the general policy respecting colonies belonging to the states of Europe, has restricted them. What, then, upon the interruption of a war, are the respective rights of belligerents and neutrals, regarding such colonies of the enemy? It is an indubitable right of the belligerent, to possess himself of such places, as of any other possession of his enemy. This is his common right; but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies. If they cannot be supplied and defended, they must fall to the belligerent, of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected. He can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say—"True it is, you have, by force of arms, forced his colonies out of the exclusive possession of the enemy; but I will share the benefit of the conquest. You have, in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained, against the whole world, and with which we had never presumed to interfere; but we will now interpose, to

prevent his absolute surrender, by the means of that very opening which the prevalence of your arms alone has effected. Supplies shall be sent, and their products shall be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself. We insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

Upon these grounds, the learned judge proceeds to say: "It cannot be contended to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which is now forced open, merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will, but his necessity, that changes his system; that change is the direct and unavoidable consequence of the compulsion of war. It does not flow from the counsels of the enemy, but from the force of his adversary."

It is not to be denied, that these observations are a virtual surrender of the rule, as universal or general. The trade of neutrals with the colonies of the enemy is not unlawful because it is first opened to them during a war. It is only unlawful, when its direct and immediate tendency is to relieve the colonies from a hostile pressure, so close and imminent, that, but for the interference of neutrals, it would inevitably compel their surrender. That such was the meaning of the learned judge, is rendered, if possible, still more evident by his subsequent remarks. In the case from which his argument is extracted, the counsel for the claimants

strenuously urged, that variations are constantly made by the nations of Europe, when engaged in war, in their measures of commercial policy, by which neutrals are admitted to privileges, from which, in time of peace, they were wholly excluded. That such variations, of which England herself had given many examples, are always a consequence of the war. They are made on account of the war, and are intended to obviate some inconvenience that the war produces ; but that it had never been held, that they were, on that ground, so unlawful as necessarily to involve the property of neutrals, who avail themselves of a new privilege, in the peril of confiscation.

To these observations, Sir William Scott replied, that it is true that such variations as had been described, take place in war, and arise out of a state of war, but that they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom ; which, in his judgment, was the true foundation of the principle. "It is not every convenience," he added, "or even every necessity, arising out of a state of war, that can be admitted to produce the effect of rendering the neutral trade unlawful, but that necessity alone which arises out of the impossibility of otherwise providing against the urgency of distress, inflicted by the hand of a superior enemy." The reasoning, therefore, of the learned judge, leaves no doubt as to the true and sole foundation of the rule that he enforced. It is the existence of a naval superiority, so decided as to be enabled to prevent all exports from the colonies of the enemy, and to intercept all their supplies, thus forcing the enemy to open his ports to neutrals, as the only

means of rescuing them from capitulation or ruin. Unless the rule can be sustained on these grounds, it is, in effect, admitted, that it has no legal existence. (a)

§ 5. To the doctrine thus stated there are unanswerable objections. It derives all the plausibility with which it is invested in the argument that has been given, from a series of positions, that, without evidence, are assumed to be true, and from the truth of which the illegality of the trade seems to flow as a necessary conclusion. Stript of the disguise with which a most skilful phraseology has clothed it, the doctrine is an unwarranted, and most dangerous extension of the *right of blockade*, at utter variance with the principle on which the *law of blockade*, as now understood and defined, is certainly founded. The law of nations, in requiring the immediate presence of an adequate force as necessary to constitute a valid blockade, evidently implies, that it is only by this mode of applying its force, that the ability of the blockading state, to suspend, entirely, the commerce of the blockaded port, can be manifested. This entire suspension, this temporary destruction of the commerce of the port, is the object of a blockade. An actual and complete investment, the only means, by which, in judgment of law, the object can be accomplished. But the argument of Sir William Scott gives to a superior naval force, consisting of a multitude of ships dispersed on the ocean, exactly the same effect in rendering unlawful the trade of neutrals with the colonial ports of the enemy, that would result from an actual block-

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(a) Sir William Scott's opinion in the *Immanuel*, (2 Rob. pp. 200—4.)  
Vide also, his argument in the *Emmanuel*, (1 Rob. 296.)

ade, a separate and effectual naval circumvallation, of each and every one of them. The colonial trade of the enemy is suspended, is cut off, but for neutral interference, (such is the argument,) would be annihilated ; but it is suspended, not because at the entrance of each colonial port, a naval force is stationed, rendering dangerous the attempt of any vessel to enter or depart ; this is not pretended. The colonial trade of the enemy, in all its extent and magnitude, is suspended, not by a blockade of the colonial ports, but by a blockade of the ocean. To such an extravagant pretension of the belligerent the reply of the neutral is conclusive. " You require us not to rob you of the conquest for which your blood and treasure have been expended ; not to intercept the fruits of your victory, by conveying supplies to the colonies of the enemy, that are pressed by your arms, and, if unsupplied, must inevitably fall into your possession. Prove to us that you have the ability to intercept the supplies that we desire to send, by an actual and legal investment of the ports from which you would exclude us, and we yield to your demand. Otherwise, your allegation, that you possess a superior naval force, competent to effect the object, we must wholly disregard. It is a mere assertion, unsustained by the only proof that the universal law, by which we are equally bound, deems to be sufficient."

§ 6. It has already been intimated, that the reasons on which the English courts of admiralty have proceeded, may, by a legitimate extension, be applied to the entire destruction of neutral commerce, and a few remarks will suffice to show, that all the commerce of neutrals with the mother country, the

whole of their accustomed trade, may be prohibited exactly on the same grounds on which they are excluded from a trade with the colonies. If a court of admiralty has the right to assume, that the naval superiority of its own country is so decided, as to be competent to destroy effectually and absolutely, all the trade of all the colonies of the enemy, no reason can be assigned, why it may not assume the existence of the same power in relation to all the trade of the parent state; and if the trade of neutrals with the colonies of the enemy is unlawful, because it has an immediate tendency to rescue them from the consequences, otherwise inevitable, that the superior force of the belligerent would produce, the trade with the mother country must be equally unlawful, where its pernicious tendency is equally immediate and equally certain. Let it not be said, that neutrals have a full security against such an extension of the doctrine, in the admission, that they are entitled to prosecute, during a war, their accustomed trade, in all the extent of which it is capable. They have no such security. Neutrals have no right to enjoy their accustomed trade in time of war, where its continuance tends directly to aid the enemy in the prosecution of the war, or to relieve him from its immediate pressure. They have no right to retain the smallest portion of their accustomed trade with a port effectually blockaded. Hence, if in relation to a single port, a superior naval force on the ocean, may be held to produce the same legal consequences as an actual blockade, the same legal consequences must follow, *in all cases*, where the existence and adequacy of the superior force, on similar grounds, are established or asserted. If the position can be

true of a single port, it may be true of all; and if a court of admiralty may constitute itself the sole judge of the existence of the necessary facts in a single case, it may in all. The existence and the sufficiency of a blockade are definite facts, capable of being established or refuted by positive evidence; but the existence of a naval superiority on the ocean, its competency to destroy, partially or wholly, the commerce of the enemy, and the certainty, that, but for neutral interference, the object would be accomplished, are facts, that, in applying its doctrine, the belligerent court of admiralty, upon its own authority, assumes to be true. They are not attempted to be proved, and indeed, from their very nature, are incapable of being established by legal evidence. It is enough that the presiding judge of the admiralty asserts their existence, and to the extent in which he chooses to make the assertion, the commerce of neutrals is annihilated. Hence, there is no possible security for neutrals, except in a strict adherence to the rule, that their trade, even with a single port of the enemy, cannot be wholly interdicted, unless by means of a legal blockade. Admit the principle on which Sir William Scott founds his decisions, and there are no limits to its possible application. The commerce of the neutral, in all its extent and in all its branches, is delivered over to the mercy of the belligerent.

§ 7. These remarks lead naturally to the last objection, that I propose to state, and which seems alone decisive. The rule of the English admiralty, as explained and vindicated, is vague and equivocal in its terms, uncertain and arbitrary in its application. It seems expressly framed to entrap the

neutral merchant to his ruin. It is impossible that the merchant can know, when he meditates or begins a voyage, whether the existing state of facts will, necessarily, or probably, call the rule into operation. He may always know whether the articles in which he desires to trade, are held to be contraband of war by either of the belligerents. He may always ascertain whether the port to which his ship is destined, is under an actual blockade. It is only by his own voluntary act, or by the gross misconduct of his agents, that his property, in these cases, can be exposed to confiscation from a violation of neutral duty. But how is the neutral merchant to ascertain, at any given period, of the war, that the naval superiority of one of the belligerents is so decided, as to afford the certain means of reducing into its possession all the colonies of the enemy, by preventing their exports, and intercepting their supplies? How is he to ascertain that the force, however superior, is so employed and disposed, as to enable it with certainty to accomplish the object?(a) How is he to ascertain

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(a) Clearly this is a necessary part of the inquiry. If in a war between England and France, England should have a thousand ships of war and France not one, if all the ships of England were shut up in her own ports, the colonies of France would be in no danger, or if their operations were confined to the British channel or the Mediterranean, the colonies, in the West and East Indies, would be able to obtain, without molestation, all their necessary supplies. The observations of Sir William Scott certainly imply that the superior naval force must be actively and efficiently employed. His language is, "If the belligerent choose to apply his force to such an object, (the conquest of the enemy's colonies,) what right has the neutral to step in and prevent its execution?" But how is the neutral to know that the belligerent has chosen to apply, and is actually applying his force to this object? and if the test of a blockade be abandoned, who shall define the facts that shall be considered as evidence of the proper application of the force?



that these colonies are so exclusively dependent for their existence on foreign supplies, that unless supplied by neutrals, they must inevitably fall into the possession of the belligerent? How is he to ascertain, that the opening of the colonial trade, into which he desires to enter, was a direct and unavoidable consequence of the compulsion of war, and not such a variation in the commercial policy of the enemy, as, it is admitted, that nations engaged in war have a right to adopt? and, above all, with whatever care and deliberation he may proceed, and however confident he may be in the truth of the conclusions at which he arrives, what security can he have, that his own judgment will coincide with that of the tribunal, by which the legality of the voyage, and the fate of his property may chance to be determined? It is manifestly unreasonable and unjust, to impose upon the neutral merchant the necessity of prosecuting inquiries so multiplied and intricate as these; and to make the fate of his property, perhaps his safety or ruin, depend on the issue of a deliberation, so delicate, and doubtful, and complex. Hence, the rule, although limited, as explained, to a peculiar state of the war, and this a state not likely frequently to occur, is to the prudent merchant, an entire prohibition of the trade to which it relates, and to the rash and adventurous, a dangerous snare. The prudent merchant will not expose his property to the indefinite perils of a rule, so loose and vague in its terms, and so discretionary in its application; and the adventurous, when most confident of his safety, will often find, that the snare he ought to have dreaded, is sprung to his destruction. If no servitude is more wretched or degrading than that

of the subject or citizen, where the laws that he is required to obey are vague or unknown, it is to this species of servitude that neutrals are doomed, in every future war in which England shall be a party, if the pretensions of her government, and the authority of the rule on which her tribunals have acted, are to be admitted, as adopted and incorporated into the law of nations.

§ 8. As it is by no means probable that the rule of 1793 will be revived in future wars, not only from its own doubtful character, and the resistance that the attempt to enforce it will be certain to provoke, but from the great changes that have since been made in the colonial system of the powers of Europe, it will be unnecessary to examine in detail the various decisions in which it was enforced; it will be sufficient to state, in few words, their substance and result.

In respect to the coasting trade of the enemy, the rule, as enforced in the English admiralty, seems to have been substantially the same with that of 1756. There is no case in which the penalty has been extended beyond a forfeiture of the freight, unless where the true destination of the ship was sought to be concealed by false papers. In such cases, the fraud involves the ship in the general condemnation.(a)

The rule, in its application to the colonial trade, underwent, during the war, several modifications. In 1793, the British government issued instructions to its public and private ships of war, "to detain and bring in for adjudication, all neutral vessels laden

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(a) *The Emanuel*, (1 *Rob.* 296.) *The Phoenix*, (3 *Rob.* 186.) *The Johanna Tholen*, (6 *Rob.* 72.)

with the produce of any colony of France, or carrying provisions or other supplies for the use of any such colony." In 1794, these instructions were modified so as to authorize only "the capture of vessels with cargoes, the produce of a French West India Island, on a direct voyage from the colonial port of lading to a port in Europe," thus, leaving open and unrestricted the direct trade between the French West Indies and the United States, and from the latter, in vessels with colonial produce, to any other part of the world. In 1798, the instructions were still further extended, so as to permit to neutrals a direct trade between the colonies of the enemy and a port of Great Britain, or any port of a country in Europe, to which the neutral ship might belong. All the subsequent alterations, however, although, of necessity, obeyed by the courts of admiralty, were considered by them as a mere relaxation of the general rule, which, as an admitted principle in the law of nations, they held to be truly declared, not introduced or established, by the original instructions. Hence, although the instructions were silent as to the penalty, that of confiscation was, without hesitation, adopted ;(a) and, although the first orders of the government were not issued until November, 1793, neutral ships that had previously commenced their voy-

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(a) In the earlier cases, the ship was restored, and the penalty limited to the forfeiture of her freight on the goods condemned. *The Rebecca*, (3 Rob. 101.) *The Immanuel*, (3 Rob. 206.) *The Rose*, (*infra*) *The Minerva*, (3 Rob. 232,) but the Lords of Appeal in *The Jonge Thomas*, 3 Rob. 233 *note*, the *Wilhelmina*, 4 Rob. Append. 4, *The Nancy*, 13 12 *note*, and other cases, held that the illegality attached as strongly on the ship as the cargo, and was a just cause of her condemnation. Why it was deemed necessary to make the penalty more severe, in the colonial, than in the coasting trade, it is not easy to understand.

ages, were held to be just as liable to capture, and subject to the same penalty, as those that had sailed with a knowledge of the prohibition, and of their danger.(a) It is an obvious remark, that will not escape the attentive reader, that the subsequent relaxations, by the British government, of the rule as originally declared, were, in effect, an abandonment of its principle ; since, by the permission of a direct trade between the neutral country and the colonies, the introduction of such supplies as might be necessary to enable the latter to resist the arms of the belligerent, was rendered just as certain as it would have been, by the allowance of a similar trade, between the colonies and the mother country. Although the relaxation diminished greatly the severity of the rule in its operation on the trade of neutrals, yet it rendered it, as enforced, capricious and arbitrary, by depriving it of the support of all the arguments by which, in its original form, it was sought to be vindicated.(b) As an absolute prohibition, the rule had, at least, a pretext of justice ; as relaxed, even the pretext was abandoned.

§ 9. The doctrine, permitting the importation of the produce of an enemy's colony, into a neutral country, and its exportation thence, soon gave rise to a new, and in many cases, a difficult inquiry : whether the importation into the neutral country had been made in good faith, for the purpose of adding the goods to the common stock of the country, or was merely colorable, and intended to

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(a) *The Charlotte, The Jerusha, and The Betsey*, (4 *Rob. Append.* 11—14.)

(b) This observation, in substance, is made by the counsel for the claimant, in the *Wilhelmina*, (4 *Rob. Append.* 5.) and meets with no reply from the opposite counsel, or from the court.

conceal an original design of exportation. Where the object of the importer was not to sell or otherwise dispose of the goods, in the neutral market, but to transport them to a foreign port, to which they could not have been directly taken, it was contended, and was finally decided, that the voyage of exportation was not to be considered as a new and distinct voyage, but was a mere continuance of the original voyage, in which the goods had been imported ; and, consequently, that the entire, although circuitous voyage, was just as illegal as if the neutral port had been wholly omitted. It was a direct and continuous voyage from the colonial port to the port of ultimate destination.

The first case, in which the question arose, was that of an American vessel, on a voyage from a port in Massachusetts to Spain, with a cargo consisting partly of the produce of a Spanish colony. The evidence was, that these goods had been imported from Havana in the same vessel, and on account of the same owners ; that they had been landed in the United States, during a short time, whilst the ship was under repairs, and that the duties on them had been paid to the American government. The counsel for the captors strenuously insisted, that these facts were by no means sufficient to break the continuity of the voyage, and that the prohibition of a direct trade, between the colony and the mother country, would be nugatory, if the voyage could be legalized, by the mere transhipment of the goods in the United States ; but to this argument Sir William Scott replied, that an American had an undoubted right to import the produce of the Spanish colonies, for his own use, into his own country, and after he had imported it, in good faith,

was at liberty to carry it on to the general commerce of Europe ; that, although it had been contended, that the landing of the goods and the payment of the duties were not sufficient evidence of an importation in good faith, he was at a loss to know, if these criteria were not to be resorted to, what other test could have been adopted. He would not say what should be universally the test of a *bonâ fide* importation, but was strongly disposed to hold that the facts relied on were sufficient ; and he accordingly decreed the restoration of vessel and cargo.(a)

The merchants of the United States relied on this decision, as establishing the rule, that the landing of the goods, and the payment of the duties, would be regarded, in all cases, as conclusive evidence that the continuity of the voyage had been broken, so as to legalize a subsequent exportation ; yet it must be confessed, that the inference was broader than the language of the judge seems to have warranted. Confident, however, of their safety, they engaged largely in trade with the colonies of France and Spain, with a view to the reshipment to European ports, of the colonial produce. But, when this trade had existed for some years, without interruption, they were suddenly awakened from their dream of security. The Lords of Appeal discovered, that the tests, which it was supposed that Sir William Scott had held to be universally conclusive, might be, and, in many instances, were fallacious ; and the seizure and condemnation of a vast number of American ships and cargoes, were the fruits of this discovery.(b) The principle of

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(a) *The Polly*, (2 Rob. 361.)

(b) *The Polly* was decided in 1800, and the first case in which it was

these decisions was, that the original intention of the importer, to tranship and export the colonial produce, was the proper and sole test of the continuity of the voyage, and that his intention was to be collected from all the attending circumstances. That among these, the landing of the goods, and the payment of duties, were of some value ; but, like other facts, they might be purely colorable, designed to give a false appearance of an importation, where none was intended.

§ 10. In one of the cases, in which, on the ground of the continuity of the voyage, the vessel and cargo were condemned, it appeared, that the duties had been paid and the goods landed in the United States ; but it was certain, from the evidence, that they were not imported to be added to the common stock of the country, but with a sole view to their reshipment and exportation. Sir William Grant, who delivered in this case the judgment of the Lords of Appeal, vindicated their decision, substantially, on the grounds that follow.

'The act of shipping the cargo, he observed, from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage, and the commencement of another. It may be wholly unconnected with any purpose of importation into the

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held by the Court of Appeal, that the landing of the produce and payment of duties were not alone decisive of the legality of the voyage, seems to have been that of the *Essex*, decided in September, 1805, (5 *Rob.* 369.) It was in consequence of this decision, that so large a number of American ships were seized, and their seizure led to the general complaints of the merchants, and the remonstrance of the American government. The validity of the rule of 1756, seems then, for the first time, to have been examined.

place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? So, where the party has a motive for desiring to make the voyage to begin at some other place than that of the original lading, and therefore lands the cargo, purely and solely, for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board. Would this contrivance at all alter the truth of the fact? The truth may not always be discernible, but when discovered, it is the truth, and not the fiction, that determines the character of the transaction. If the voyage, from the place of lading, be not really ended, it matters not, by what acts the party may have evinced his desire of making it appear to have been ended; nor, with what trouble and expense, those acts may have been attended. Where the evasive purpose is admitted, or proved, a court can never be bound to accept, as a substitute for the observance of the law, the means, however operose, that were employed to cover its breach. Between the actual importation, by which a voyage is really ended, and the colorable importation, which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same, but there is this difference between them. The landing of the cargo, the entry at the custom-house, and the payment of the duties, are necessarily ingredients in a genuine importation; but in a fictitious, they are mere voluntary ceremonies, which have no natural connection



whatever with the purpose of sending to another market, and which never be resorted to, by a person purpose, except with a view of giving which he had resolved to continue of being broken, by an importation resolved not really to make.(a)

It is intimated by a high authority doctrine, that forbids a direct trade between the mother country and the enemy, is admitted as true, the English decisions, relative to the voyage, cannot reasonably be fully admit, that, upon this supposition force of the reasoning on which were founded, is not to be denied. It is certain, that the change of the rule, on reasonable grounds, Sir William Grant has established, and which, since it was undisturbed, operated as a disadvantage to American merchants, and hence the remonstrance of their government, and the change, so important and disastrous consequences, had been made, without which were not unreasonable.(c) The Court, under these circumstances, the Court

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(a) *The William*, (5 Rob. 395-6.) Vide also

(b) 1 Kent's Comment. (5th ed.) p. 85, note

(c) Sir William Grant, in the *William*, at which American merchants had warning, from the instances previous to the *Essex*, that the rule laid down should not be literally followed. But, until the *Essex* was pronounced, in any case, where the goods had been paid, and of the mere opinion of the Court, the Court was necessarily ignorant. That they were, in fact, Sir William Grant does not deny.

may have felt it their duty to condemn, the government of a great and magnanimous nation, should have hastened to restore.(a)

§ 11. The last class of the duties that the law of nations imposes on neutrals, are not to resist the belligerent right of search, nor to resort to fraudulent means, for defeating the rights of capture. The rules to be extracted, from the decisions on these subjects, will be stated under the following heads :

1. Resistance to Search.
2. Concealment and Spoliation of Papers.
3. The Use of False Papers.

§ 12. The right of visiting and searching on the high seas, all merchant ships of every nation, whatever may be their character, their cargoes, or their destination, incontestably belongs to the lawfully-commissioned cruisers of every belligerent power. Until they are visited and searched, whether the ships and cargoes, from the ownership or nature of the property, or the character of the voyage in which they are engaged, are liable to capture, can-

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(a) The reader who is desirous to pursue the investigation as to the legality of the rule of 1756, may consult on the one side, in addition to the decisions in the admiralty reports which have been cited, and to which the following may be added : *The Welvaart*, (1 *Rob.* 122.) *The Providentia*, (2 *Rob.* 142.) *The Calypso*, (2 *Rob.* 154.) *The Rosalie and Betty*, (2 *Rob.* 343 ; 4 *Rob.* Ap. A.) *The Juliana*, (4 *Rob.* 328.) *The Anna Catharina*, (4 *Rob.* 107 ; 6 *Rob.* note, p. 74 ; note, p. 252. App. Notes 2 and 3.) *The Thomyris*, (1 *Ed.* 17.) *The Convenientia*, (4 *Rob.* 201.) Lord Liverpool's "Discourse on the conduct of the government of Great Britain," &c., Ward "On the rights and duties of belligerents and neutrals," and Mr. Stephens' celebrated pamphlet entitled "*War in Disguise*," and, on the American side, Mr. Madison's "*Examination of the British Doctrine*," &c., and the memorials of the merchants of Baltimore, New-York, Boston, and Salem, (*American State Papers*, vol. 5, pp. 330-355-367-379.) The memorial of the merchants of Baltimore, which was drawn by Mr. Pinkney, is a masterly production, and has suggested several of the topics on which I have insisted. Vide also Note I.

not possibly be known; and for the purpose of ascertaining these facts, the right of a preparatory and strict examination, on the part of the belligerent, is necessarily given. It flows, therefore, from the right of capture, and if its existence be denied, the right of capture must either be abandoned, or must be so extended, as to authorize the indiscriminate seizure of all merchant ships, that are found on the ocean. Even, were the rule, for which some nations and some writers have contended, that *free ships make free goods*, to be admitted, the inquiry, by visitation and search, would still be necessary, to ascertain whether the ships claiming the benefit of the rule, are free, or belong to the enemy. Nor is the legality of the right of search merely evident on principle. It is sustained by an ancient, uniform, and universal usage, and it is admitted, as justly founded on principle and usage, by all writers of authority on public law, not even with the exception of those, who are distinguished as the strenuous and zealous advocates of neutral rights.(a) It is true, that the exercise of the right of search is, in a certain sense, an act of force, but it is so, in the same sense, as the execution of civil process on land. It is an act of lawful force, and cannot, therefore, be lawfully resisted. Where two nations are opposed in war, each has a perfect right to attack and repel, by force; but where the relations of two nations are friendly, although the one is belligerent and the other neutral, no such conflicting rights can possibly exist. The right of the belligerent to apply his force to the neutral pro-

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(a) Hubner "De la saisie des battimens neutres" and Azuni "Sistema universale dei Principi del diritto marittimo dell' Europa.

perty for a lawful purpose, necessarily implies the duty of submission on the part of the neutral.(a)

The grounds of this duty, and the injurious consequences that would flow from its violation, are forcibly stated by Sir William Scott. The principle of the law on this subject, he asserts, is founded on the soundest maxims of justice and humanity. Were neutral crews allowed to resort to violence, to withdraw themselves out of the possession taken by a lawful cruiser, for the purpose of a legal inquiry, the whole business of the detention of neutral ships, would become a scene of mutual hostility and contention. Their crews would have to be guarded with all the severity and strictness practised upon actual prisoners of war. A resort to the same measures of precaution and distrust, would become inevitable, and the intercourse of nations, neutral and friendly towards each other, would be embittered, by the frequent acts of hostility, mutually committed by their subjects.(b)

Although the duty of the neutral is that of unresisting submission, it is not to be inferred, that the belligerent, in his exercise of the right of search, is subject to no restraints. The right is lawful, but must be exercised in a lawful manner. The search is to be conducted with as much regard to the rights and safety of the vessel detained, and of the master and crew, as is consistent with a thorough examination into the real character of the vessel, and of her cargo and voyage. All acts, that are necessary to accomplish this object, are lawful; all, that transcend the limits of this necessity, un-

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(a) Sir Wm. Scott's opinion in the *Maria*, (1 *Rob.* 360-1.)

(b) The *Dispatch*, (3 *Rob.* 279-80.)

lawful.(a) It is, however, proper to be observed, that even when acts of unnecessary, and therefore unlawful violence, are committed by the belligerent, unless they menace his life, or the lives of his crew, the proper course of the neutral master is to remonstrate and submit. The wrongs he may suffer are not to be redressed by force. As the law of nations is now administered, he may be certain that a full compensation in damages will be awarded him; and should this compensation be denied him by a belligerent court of admiralty, his personal wrongs would become those of his country, and it is by his own government that their redress would be sought and enforced.(b)

§ 13. The resistance of a neutral ship to the lawful exercise of the right of search, cannot be justified or excused, by the instructions or orders of the government of the country to which she belongs. The law of nations does not permit the sovereign power of a neutral state, to interpose its authority for such a purpose, so as to vary the legal rights of the belligerent. Such an exercise of authority is in itself a plain departure from neutrality, and, if not revoked, might be treated by the belligerent government, as a measure of hostility. Hence, the obedience of the neutral subject to the unlawful orders of his government, so far from justifying his conduct, will impress him with the cha-

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(a) Ch. J. Marshall, in the *Anna Maria*, (2 *Wheat.* 332.) The Dispatch, ut sup. The right of search cannot be lawfully exercised within the territorial limits of a neutral power. The attempt, if made, may be resisted. The *Topaz*, (2 *Act Ap. Ca.* p. 20.)

(b) The *Anna Maria*, (2 *Wheat.* 328,) was a case of gross misconduct on the part of an American privateer, and the Supreme Court of the United States gave, as damages, the entire value of the injured vessel and cargo, with interest and charges.

racter of an enemy. Nor is it necessary in all cases, that there should be an actual resistance, by force, on the part of a neutral ship, in order to constitute the offence that the law of nations prohibits, and to which its penalty applies. If a neutral ship is sailing under the protection and convoy of an armed ship of her own government, the commander of which is positively instructed to prevent, if necessary, by force, the visitation and search of any of the merchant vessels under his convoy, the resistance of the armed ship, or even a meditated resistance, prevented only by the superior force of the belligerent, is, in contemplation of law, a resistance by each of the merchant vessels to which the protection of his armed force is meant to be extended ; and nothing but the clearest proof, that the purpose of resistance was wholly abandoned, before the search was commenced, will exempt any of the vessels from the penalties of the law. Two sovereigns may unquestionably agree, by special covenant, that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply that nothing is to be found in the convoy, inconsistent with amity or neutrality, and where they consent to accept this pledge, its existence, as between themselves, can never be a subject of complaint to other powers ; but no sovereign can legally compel the acceptance of such a security by mere force. It may possibly be true, that it would be well for the general interests of commercial nations, if such a security were universally accepted, which is the doctrine that some modern speculative writers have advanced or insinuated ; but to such unauthorized speculations a court of admiralty cannot listen. They derive no

countenance from the law and practice of nations, but are, in truth, the elements of a system that, if consistent, has for its real purpose an entire abolition of capture in war; that seeks, in other words, to change the nature of hostility, as it has hitherto existed, and to introduce a state of things, yet unknown to the world, that of a military war, and a commercial peace.(a)

§ 14. Whether a neutral ship, by sailing under the convoy of an armed ship of the enemy, would be deemed to forfeit her neutrality, and incur the penalty of a resistance to search; or whether some act of positive resistance, on the part of the neutral, would not be necessary, in such a case, in order to constitute the offence, is a question that does not appear to have been finally determined. The presence of an armed force of the enemy, would, doubtless, stamp a primary character of hostility, on all the ships sailing under its protection; and I venture the opinion, that the presumption thus arising, if not conclusive, could only be repelled by the clearest evidence of an innocent intention. It would be necessary to show that the apparent connection between the armed force of the enemy, and the neutral ship, was purely casual, and that there was no design on the part of the neutral, under any circumstances, to avail himself of the protection of the armed force, in order to defeat the rights of the opposite belligerent.(b)

It has, however, been determined by the Supreme Court of the United States, not only that goods of a neutral may be lawfully conveyed in

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(a) *The Maria*, (1 Rob. 361.) *The Elsabe*, (4 Rob. 408.)

(b) *The Sampson Barney*, quoted by counsel in the *Maria*, (1 Rob. 346.)

an armed ship of the enemy, but that they do not forfeit their neutral character even by the resistance of the ship to belligerent capture, unless, where the neutral owner prepares, directs, or, by some positive act, unites in the resistance. (a) The authority, however, of this decision, as a just exposition of the law of nations, is greatly impaired, by the dissent of a learned judge, by whom the principles and doctrines of that law, are known to have been profoundly studied, and whose decisions evince his masterly knowledge of the entire system to which they belong. This eminent jurist earnestly contended, that the principle of a constructive resistance, applied, even with greater force, to a neutral, sailing under the protection of a belligerent, than of a neutral convoy, since it is manifest, that the belligerent will, at all events, resist a search, and it is just as manifest, that it is with an intent to evade a search and its consequences, that the neutral seeks belligerent protection. The act, therefore, of sailing under such a convoy, is in its nature inconsistent with neutrality. It is a premeditated attempt to oppose, if practicable, the right of search, and to this preliminary act the full effect of actual resistance may be justly and legally imputed. It is evident, that these observations of the learned judge, if just in themselves, were irresistible in their application to the case under consideration. If the act of sailing under belligerent convoy is sufficient evidence of the intention of the neutral, to evade, by a forcible resistance, the right of search, the evidence, that such was his intention, that results from the actual conveyance of his

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(a) *The Nereide*, (9 *Cranch*, 388.) Opinion of Mr. J. Story, (p. 440-1.) Vide Note II.



goods in an armed ship of the enemy, is still more conclusive. The same inference, however, cannot be justly drawn when the goods of a neutral are conveyed in a merchant ship of the enemy, which, we have already seen, is perfectly lawful. Such a conveyance affords no evidence of the intention of the neutral to evade the right of search by the opposite belligerent, since it is wholly improbable, that, by an unarmed vessel, any resistance to an armed force will be attempted. Even the actual resistance in such a case of the enemy ship to a belligerent seizure, it is highly probable, would not be held to impress a hostile character on the goods of the neutral owner. This opinion is certainly supported, by the observations of Sir William Scott, in a case, where a rescue was attempted after capture by an enemy master, although the actual decision of the court was placed on different grounds.<sup>(a)</sup>

§ 15. To constitute a criminal resistance to a belligerent search, the knowledge of the neutral master of the existence of war, and of the national and lawful character of the belligerent cruiser, claiming the right of search, are necessary to be proved. In other words, there must be an intentional violation of neutral duty, and this intention cannot exist, unless the character and rights of the belligerent are known. The neutral master would, indeed, never be allowed to plead his ignorance of the law ; but his involuntary ignorance of the facts, on which the legal existence of the right of search depends, must, in all cases, be a valid defence. It also seems to be necessary, that there should be

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(a) *The Catharine Elizabeth*, (5 Rob. 232.) This case was relied on in the *Nereide* in support of the judgment of the court ; but is clearly shown by Mr. J. Story not to have been applicable as an authority. (9 *Cranch*, 451.)

some act of positive resistance, after the belligerent, with a view to the prosecution of the search, has assumed the possession of the neutral ship, and that a mere attempt to escape, in order to prevent an actual possession, would not be held to draw after it the penal consequence of a condemnation. (a) After a capture, the neutral master is not bound to navigate the ship for the benefit of the captors, and his refusal to do so, cannot be treated, as an act of resistance, or an attempt of rescue. (b)

§ 16. The nature and extent of the penalty that properly follows a contravention, by a resistance, of the right of search, seems to be as free from doubt, as the existence of the right itself. It is the confiscation of all the property that is attempted to be withheld from a lawful examination, or that, if captured, is attempted to be rescued. The criminal act of the neutral master involves all the property entrusted to his charge ; not merely that of his owners, but of the shippers, although between them and himself no relation of principal and agent can be said to exist. This severity, we have seen, is not applied to the transportation of contraband, nor, in all cases, to the violation of a blockade ; but it is fully justified, by the greater criminality and more dangerous tendency of the acts, the commission of which it seeks to prevent. A forcible resistance to a lawful search, is a distinct and substantive cause of condemnation. It does not merely aggravate the penalty to which the ship or the goods, or a portion of them, might otherwise be liable. The goods may be wholly innocent, in their nature, and from their destination ; and their true character, and

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(a) *The St. Juan Baptista*, (5 Rob. 33.)

(b) *The Pennsylvania*, (1 Act. 38.)

that of the ship, as neutral, may be undoubted, but the unlawful resistance, from the time it is attempted, stamps on them all an illegal character, and involves them all in its fatal penalty.(a)

§ 17. As the object of a belligerent search is, to ascertain the true character of the vessel and cargo, and their liability to or exemption from capture, it draws after it, as a necessary consequence, a right to the production and examination of all the papers and documents on board, that are connected with, or may disclose the facts, that the belligerent has an interest in knowing. Hence, the neutral master, or other agent to whom such papers may be entrusted, is bound to deliver them over, on request, and his concealment or destruction of any portion of them, is a violation of neutral duty, that may be attended with consequences highly penal. The act, however, although intended to frustrate, by evasion, the right of search, is, by no means, deemed so criminal in its nature, as a forcible resistance. It is true, that in the general

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(a) All the cases previously cited, and *The Topaz*, (2 *Act*. 20.) and *The Franklin*, (*Ib*. 106.) On the subject of resistance to search, and its penalty, the following authorities may be consulted: Grotius, L. 3, c. 1, § 5; Vattel, L. 3, ch. 7, § 112; Bynkershoek, Q. J. P., L. 1, c. 14; 2 Wheaton's *Inter. Law*, p. 248; *Law of Nations*, p. 145—152; 1 Kent's *Comment*. (5th ed.) p. 153. On the subject of the visitation of vessels in time of peace, for the sole purpose of ascertaining their national character, a right recently claimed by the government of Great Britain, and which seems to be denied by that of the United States, I refer the reader to a note of Chancellor Kent, in the last edition of his *Commentaries*, (1 *Kent's Com.*, 5th ed., p. 153, note,) in the conclusions of which I entirely concur; namely, that the intervisitation of ships at sea, in time of peace, is a branch of the law of self defence; that, in point of fact, it is practised by the public vessels of all nations, including those of the United States; that it is wholly distinct from the right of search, has been distinctly recognized by the Supreme Court of the United States, (*The Marianna Flora*, 11 *Wheat*. 43,) and is well warranted by the principles of public law and the usages of nations.

maritime law of Europe, this distinction can scarcely be said to exist. In other countries, the concealment or spoliation of papers—a term equivalent to their destruction—founds an absolute presumption that the act was committed for the purpose of fraudulently suppressing evidence, that, if produced, would have justified a condemnation; and this presumption, which the party is never allowed to repel, leads to the same result, as the actual production of the proof, that it supposes to be withheld; but the lenity of the English code, which is followed in the United States, has not adopted this rule in its full rigor. In England, and in the United States, the concealment, or even the spoliation of papers, is not alone a sufficient ground for condemnation in a court of prize. It is always a circumstance of great suspicion, and, as such, it justifies a detention and capture, and where the suspicions, which it creates, are not removed, they may lead to a confiscation; still the circumstance is open to explanation. There may have been no fraudulent intent. The act may have arisen from accident, necessity, or superior force; and where the explanation given, is satisfactory to the court, the party is not deprived of any right, to which he would otherwise have been entitled; but where the concealment, or spoliation, is unexplained, or the explanation given is rejected, as insufficient or futile, the act is always regarded, as an evidence of bad faith, and where this appears, it is a universal rule, that the conduct of the party is liable to the worst construction. It is a fair presumption, that the papers related to the ship or cargo, and that they contained facts that it was of material consequence to some interests, should be withheld from

the knowledge of the captors. Hence, if the remaining papers and documents are not sufficient of themselves to remove all doubt and obscurity from the cause, the party is denied the benefit of further proof, and a condemnation then ensues from defects in the evidence, which he is not permitted to supply. Thus the concealment or spoliation, although not immediately, yet indirectly, is the cause of confiscation.<sup>(a)</sup> The extent of the penalty that this misconduct of the master, or other agent, may induce, is not, from the decisions, easy to be determined, by any general rule. It must, probably, depend on the conclusions that the court may adopt, as to the motives and object of the unlawful act, and the nature of the interests meant to be benefitted. Where the spoliation is entire, so that no papers are left to show the title, character, or destination of the property, the inevitable consequence seems to be, a general condemnation; but where the act is partial in its operation, there seems to be no valid reason why innocent goods, if, from the papers that remain, the neutral title is clear, and free from suspicion, should not be restored, unless, they are the property of the person committing the unlawful act, or of his principal. In a leading case,

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(a) *The Two Brothers*, (1 Rob. 131.) *The Rising Sun*, (2 Rob. 104.) *The Polly*, (2 Rob. 362.) *Livingston v. Maryland Ins. Co.* (7 Cranch, 544-45.) *The Pizarro*, (2 Wheat. 241.) *The Hunter*, (1 Dod. 480.) It is the practice of the prize courts to confine the first hearing of the cause to the papers found on board the ship, and the preparatory examinations; that is, the affidavits of the master and crew. If these papers and examinations acquit or condemn, there is, in general, an end to the cause. If they present a case of doubt or difficulty, further proof is admissible, and, in cases free from the imputation or suspicion of fraud, is universally allowed. Mr. J. Story, in the *Ann Green*, (1 Gallis, 281.) Vide, also, the *Sarah*, (3 Rob. 330;) *The Romeo*, (6 Rob. 351;) *The Vriendschap*, (4 Rob. 166.)

Sir William Scott appears to have gone still further. The master, who, in this case, was guilty of the spoliation, was himself the claimant of a large portion of the cargo, and all the property that he claimed, as a necessary consequence of his misconduct, was condemned; but the learned judge deemed that it would be too severe to hold that his owners, in respect to their separate property, were concluded by the illegal act of their agent; and although the evidence of their property, as the case then stood, was not sufficient, he allowed them the benefit of further proof, and clearly intimated, that if the proof should be satisfactory, that portion of the cargo would be restored. So far, however, as the freight was concerned, he held, that the owners of the ship were legally bound, by the misconduct of the master, and that its forfeiture was a necessary part of his sentence.<sup>(a)</sup> It is, however, necessary to be observed, that it was, in this case, a most material circumstance, that the master was himself the claimant, and in his own right, of that part of the cargo which was condemned. Hence, it was a reasonable presumption, that the papers, which he destroyed, related exclusively to the goods that he sought to protect. In a subsequent case, in which the confiscation of a very valuable cargo was, in effect, the result of the misconduct of the master, Sir William Scott clearly adverted to this distinction, in the observation, that the spoliation of papers is not always damnatory, particularly, where the act was committed by a person who had interests of his own that might be benefitted.<sup>(b)</sup>

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(a) *The Rising Sun*, (3 *Rob.* 108.)

(b) *The Hunter*, (1 *Dod.* 480.)

§ 18. The use of false papers, although in all cases morally wrong, is not in all cases a subject of legal animadversion in a court of prize. Such a court has no right to consider the use of the papers as criminal, where the sole object is to evade the municipal regulations of a foreign country, or to avoid a capture by the opposite belligerent. The falsity is only noxious where it certainly appears, or is reasonably presumed, that the papers were framed with an express view to deceive the belligerent, by whom the capture is made, so that, if admitted as genuine, they would operate as a fraud on the rights of the captors. It is not sufficient, that the papers disclose the most disgusting preparations of fraud, in relation to a different voyage or transaction. The fraud must certainly, or probably, relate to the voyage or transaction, which is the immediate subject of investigation. The court will not go the length of holding that persons detected in the meditation of fraud, in a different transaction, are totally incapacitated from obtaining any credit in regard to that which is immediate, or, that such a discovery is sufficient to blast, or, in the strong language of Sir William Scott, to blow up, every case in which they are concerned.(a)

In cases, in which the illegal purpose is not evident, but the intention of the parties, in the use of the papers, and the real character of the transaction, are left in obscurity and doubt, the falsity of the papers has the same effect as a spoliation. It excludes further proof, and proves indirectly a

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(a) *The Eliza and Katy*, (6 Rob. 192.)

cause of forfeiture.(a) But where the illegality that is meant to be covered is manifest, and the intention of the parties to shield a portion of the property from capture and confiscation is undeniable, the immediate effect of the fraud is to extend and aggravate the penalty that would otherwise be inflicted, and, in these cases, it may be justly considered as a direct cause of condemnation. Thus, where false papers are used to conceal the nature or destination of articles contraband of war, the usual penalty of the loss of freight is extended to the condemnation of the ship and of the property of its owners, and, in some cases, as we have seen, embraces the proceeds of the contraband cargo on a return voyage.(b) So the usual penalty is extended to the condemnation of the ship, where her employment in the coasting trade of the enemy is sought to be concealed by a false destination.(c) Thus, also, where a neutral merchant or agent endeavors, by false papers, to cover the property of an enemy as his own, the fraud is punished by the confiscation of all his property on board, although, from its nature and destination, he would otherwise be entitled to its restitution. If a neutral will undertake to weave a web of fraud of this sort, a court of prize will not take the trouble of disentangling and separating its threads, in order to distinguish, for his benefit, the sound from the unsound.

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(a) *The Juffrow Anna*, (1 *Rob.* 124.) *The Vrouw Hermina*, (1 *Rob.* 163.) *The Calypso*, (2 *Rob.* 154.) *The Carolina*, (3 *Rob.* 75.)

(b) *The Rosalie and Betty*, (2 *Rob.* 343.) *The Nancy*, (3 *Rob.* 122.) *The Jonge Tobias*, (1 *Rob.* 329.) *Supra*, (Lec. VII. § 8, p. 627.)

(c) *The Calypso*, (2 *Rob.* 154.) *The Convenientia*, (4 *Rob.* 201.) *The Johanna Tholen*, (6 *Rob.* 72.) *The Mars*, (6 *Rob.* 79.) *The Phoenix*, (3 *Rob.* 186.)



He is not permitted to say, "True, I have endeavored to protect the whole, but this part is really my property; take the rest, and restore that which belongs to me." If he will engage in fraudulent transactions with other persons, they must all stand or fall together. The regular penalty of the proceeding is the confiscation of all that he claims.(a)

The penalty for the use of false papers, is, doubtless, limited to the property of those who are parties, or privy to the fraud, or of those who, as principals, are responsible for the misconduct of their agents. Where the true destination of the ship to a particular port, or in a prohibited trade, is sought to be concealed, if the papers relative to the goods, as well as those of the ship, exhibit the falsity, the inevitable consequence must be the condemnation of ship and cargo; for, in such a case, the owners of the goods, or their agents, are original parties to the fraud; but should the papers of a particular shipment disclose the truth, the goods that it embraced, if otherwise innocent, would, doubtless, be restored. Where the fraud relates to the quality or ownership of a particular portion of the cargo, its penal consequences are always limited. As the fraud of the master or owners of the ship, would not affect the interests of innocent shippers, so the ship is not affected where, without the knowledge or privity of its owners or master, fraudulent papers are put on board by the owners of the cargo.(b)

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(a) *The Eenrom*, (2 *Rob.* 9.) *The Calypso*, (2 *Rob.* 154.) *The Graaff Bernstorf*, (3 *Rob.* 109.) *The Zulema*, (1 *Act.* 14.)

(b) Sir Wm. Scott, in the *Calypso*, (2 *Rob.* 158.) The rules of the English admiralty on the subject of false papers are more or less recognized in the following American decisions. *The Ann Green*, (1 *Gallis*,

It has already been intimated, that the use of false papers by a neutral, in order to evade the rights of capture, is, in all cases, morally wrong, and, although the position will be startling to many, it is a truth that ought not to be suppressed. It is by *false* swearing that *false* papers are usually obtained, and in all cases, when there is a judicial investigation, unless the falsity is confessed, it is by *false* swearing that the fraud, they are meant to cover, must be consummated. Even where there is no intermixture of perjury, but the papers are merely fabricated, they are the deliberate assertion of a falsehood, the sacrifice of truth to the cupidity of an illicit gain; and whether such a proceeding can be reconciled to the dictates of morality or religion, is a question to be determined by the consciences of those who may be tempted to engage in it. Those who are sincerely desirous to listen to and obey the voice of the internal monitor, will not hesitate or equivocate in their reply.

Emerigon furnishes a striking proof of the lax notions of morality on this subject, that seem, at one period, to have prevailed in France. He states, that he had heard frequent complaints from French insurers, of the conduct of the masters of neutral vessels, who had undertaken to cover from the enemy the goods of French merchants, yet, when examined in the admiralty courts of the opposite belligerent, had failed to confirm, by their oaths, the genuineness of the false papers that were used

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275.) *The Sally*, (*Ib.* 401.) *The Alexander*, (*Ib.* 536.) *The Betsey*, (2 *Gallis*, 384.) *The Fortuna*, (3 *Wheat.* 245.) *The St. Nicholas*, (1 *Wheat.* 417.) *Blaze v. N. Y. Ins. Co.*, (1 *Caines*, 565.) *Phoenix Ins. Co. v. Pratt*, (2 *Binney*, 308.)

to disguise the property, and had thus, by their unfair and unnecessary scruples, occasioned its condemnation. The learned jurist proceeds gravely to inquire, whether the complaint of the insurers was well founded, or the conduct of the neutral masters to be excused or justified. Upon this strange question of moral casuistry, he quotes the opinions of some of the most eminent writers on public law—of Grotius, Puffendorf, Wolfius, and Vattel—and he arrives at the conclusion, that, according to their doctrine, a *false* declaration by the neutral master is quite allowable, but that it would be going too far to say, that it is his duty to sustain the *false* declaration, by a *false* oath, in order to save from confiscation, the property he had undertaken to protect. It is but justice to Emerigon, to add, that this distinction, whilst it rejects perjury, justifies falsehood—a distinction, that even Grotius had sanctioned—he repudiates and condemns, as unsound and immoral; and he sustains his opinion by a quotation from Cicero, of one of the noblest passages of ancient eloquence—a passage, the sentiments of which, with the alteration of a few words, the most enlightened Christian moralist would not hesitate to adopt.(a)

§ 19. It is not to be doubted that the insurers

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(a) 1 Emerigon, ch. 12, § 20, p. 461, 462. The classical scholar will thank me for transcribing the passage to which Emerigon refers.

"At quid interest perjurum et mendacem? Qui mentiri solet, pejerare consuevit. Nam, qui semel à veritate deflexit, hic non majore religione ad perjurium, quàm ad mendacium perducitur consuevit. Quis enim deprecatione Deorum, non conscientie fide commovetur? Propterea quæ pæna ab Diis immortalibus perjuro, hæc eadem mendaci constituta est. Non enim ex pactione verborum, quibus jusjurandum comprehenditur, sed ex perfidia et malitia, per quàm insidia tenduntur alicui, Dii immortales hominibus irasci et succensere consueverunt." Oratio pro Roscio, c. 16.

on a ship or cargo, that has been condemned for a forcible resistance to search, are wholly discharged from the loss ; but what is the effect, on the subsequent risks of the policy, where the resistance has been successful, or the rescue has been effected, is a question that I do not find to have been actually determined ; yet, its solution, on principle, does not seem to be difficult. As the unlawful act in each of these cases is a sufficient and substantive cause of condemnation, I adopt the opinion, that the *delictum*, and the consequent liability of the ship and cargo to capture and confiscation, would be held to continue, until the final completion of the voyage, in which they were then engaged. Hence, the insurers, from the time, that the ship and cargo permanently lost their neutral character, would be exonerated from all the risks of the policy. The criminal violation of neutral duty would vacate the entire contract, so long as the penalty for such violation, could be held to attach.

To the concealment and to the spoliation of papers, a different rule seems to be applicable. Where a condemnation ensues, the insurers are certainly discharged ; but I can perceive no reasons for supposing that a concealment, or even a spoliation of papers, where the ship had been released and suffered to pursue her voyage, would be held to vacate or impair the policy, so as to exempt the insurers from all, or any, of its subsequent risks. The unlawful act, in this case, is not a distinct and separate ground of condemnation ; the neutral ship would not, on that ground alone, be liable to capture, during her subsequent voyage. Hence, as the risks of the insurers are not permanently in-

creased or varied, it seems a necessary consequence, that the obligation of their contract is unimpaired. There is, however, a possible distinction, between the concealment, and the spoliation of papers. The concealment, if the papers, suppressed in the first instance, are subsequently produced on a second visitation, can never operate to the prejudice of the neutral ; but a spoliation, committed at any period of the voyage, should the ship be subsequently visited and captured, may lead to a condemnation. Still, as the condemnation, in such a case, unless the spoliation is entire, is only a possible, not a necessary result of the unlawful act, I apprehend, that the mere possibility would not be held to discharge the insurers from the general risks of the policy.

Where the falsity of the papers has only the same effect as a concealment, or spoliation, the same rules must be applied in judging of the liability of the insurers. But where the use of such papers would lead, directly and certainly, should the fraud be detected, to the confiscation of the property insured, the case is widely different. In these cases, it is a probable, if not a necessary consequence, that the contract of insurance is void in its origin. Where the false papers relate to the goods, and are put on board when they are shipped, as the fraud exists, when the policy is meant to attach, it must vitiate the contract from that time, and the result must be the same as to the ship, where the false papers that are to disguise the character or nature of her voyage, are put on board at the inception of the voyage insured. Where a policy embraces several and distinct voyages, the effect of fraudulent papers would, doubtless, be limited to the particular voyage, to which alone they were intended to apply.

An anomalous decision of the Court of King's Bench is reported by Mr. Park, in which it was held, that the underwriters on a neutral ship were not discharged, even by her actual condemnation, for a resistance to belligerent search; and the grounds of the decision were, that by the law of nations, a neutral is not bound, in any case, to submit to a search, the act not being the exercise of a lawful right, but merely of a superior force, which a party, who has the ability, is always justified in resisting. It is unnecessary to make any comments on this decision. That it was founded on an entire misconception of the law, is admitted by all the elementary writers; and, in a subsequent decision of the same court, although not in terms abandoned, it was, in effect, disregarded and overruled.(a)

§ 20. The subject of maritime capture, that is now concluded, has extended much beyond the limits that it was my first intention to observe; yet, on reflection, I am persuaded, that it will not be found to occupy a relative space, disproportioned to its actual utility. In time of war, a knowledge of the extraordinary and peculiar risks that the war creates, is of paramount importance to the merchant, and to the insurer, not only in every belligerent, but in every neutral country; and in the existing treatises on marine insurance, this necessary information will be sought in vain. We should err greatly in supposing, that its value consists merely in enabling us to judge of the validity

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(a) *Saloucci v. Johnson*, (*Park on Ins.* 6th ed. pp. 105 and 498; *Marsh.* pp. 435 and 436.) It is proper to state, that the decision was pronounced by three of the judges, in the absence of Lord Mansfield. *Contra*, *Garrels v. Kensington*, (8 *T. R.* 230, and *supra.*) *Wheaton on Cap.*, 95, 96, and 97.

of insurances, made in a belligerent country. The multiplied risks to which a war exposes the property of neutrals, form the most extensive and difficult branch of the subject, and it is to the neutral merchant and the neutral insurer that the knowledge of these is most essential. To the merchant, that he may not involve his property in perils that he might otherwise avoid, or may frame his contract, so as to cover the risks that he may choose to encounter. To the insurer, that he may not assume risks, wholly disproportioned to the premium that he receives, or satisfy losses that the terms of his contract, properly understood, do not embrace. Hence, the inquiries we have concluded, as will hereafter be more distinctly seen, have an intimate connection with many subjects that remain to be treated, particularly concealment, representation, and warranty; and the information that has now been given, will relieve us from the necessity of recurring, except by a general reference, to most of the topics that it embraces.

It would be unjust to close this discussion, without a tribute of gratitude and praise to the illustrious judge, from whose decisions, the law that I have attempted to methodize and explain, has been chiefly extracted. In the same sense in which Lord Mansfield is usually termed the father of commercial law in England, Sir William Scott may be justly regarded as the founder of the law of maritime capture. Its principles, it is true, had been stated by the great writers on public law—Grotius, Puffendorf, Vattel, and Bynkershoek—but they were stated in terms so loose and general, as rendered them too liable to be differently understood and applied, by different nations. It is, by a series

of judicial decisions, in the prize courts of England and of the United States, and principally by those of Sir William Scott, that these principles have been rendered clear, definite, and stable; by their extended application, in practice, have been rescued from the domain of theory, and by successive elucidations and varied illustration, have been expanded and wrought into a consistent, harmonious, and luminous system. The opinions of Sir William Scott, the chief architect of this noble structure, are those, not merely of a jurist, but of a scholar, philosopher, and statesman; and they are as much distinguished, by the beauties of their composition, as by their sagacity, and learning, and comprehensive views. The style, although occasionally diffuse, is pure and vigorous, fertile in appropriate imagery, and rich in classical allusion. It is not, indeed, marked by that simple gravity, that we expect to find in the decisions of the courts of common law, but it is admirably suited to the discursive nature of the investigations in which he was engaged, and in which the rules that he sought to establish, are not founded on rigid precedents and technical analogies, but are drawn from the sources of a higher wisdom—that which connects the duties of nations with their true and permanent interests, and the precepts of a universal and unchanging morality.

§ 21. It remains only to add, that the decisions of the Supreme Court of the United States on all questions of international law, even where they differ from the opinions of jurists, or the adjudications of the English admiralty, must be followed and obeyed, not only by the inferior courts of the United States, but by all the courts of the respective states



of the Union. So long as they remain unchanged by the tribunal that pronounced them, they are conclusive evidence of the law of nations, as understood and maintained by our own government. We have seen, however, that this necessity of disregarding foreign authority rarely occurs, since there is scarcely a decision in the courts of Westminster, on any general question of public law, that has not been expressly, or by a necessary implication, approved and sanctioned by our national courts. On questions that have not yet been decided in our own courts, the decisions of the English admiralty, are certainly to be regarded as presumptive, although not conclusive evidence, of the existing law, that both countries equally recognize, and are bound to follow.(a)

§ 22. We have now reached the last branch of this extensive subject. Insurances in a neutral country void in their origin, as violating the duties that the law of nations imposes on neutral states, or individuals.

It is, certainly, not easy to understand why every insurance made in a neutral country, on a voyage or trade prohibited by the law of nations, is not just as invalid, as if made in the belligerent country, whose rights are violated. The case is exceedingly different from that of an insurance, on a voyage or trade, prohibited by the revenue laws of a foreign country. The law of nations is not a foreign law. In every christian country it is acknowledged as a component part of its own established law. Its authority, as such, is admitted by the tribunals; its

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(a) Vide as bearing on this and the preceding section, the observations of Ch. J. Marshall, (9 *Cranch*, 198,) and those of Chancellor Kent, (1 *Kent's Com.* pp. 68, 69, 70.)

provisions, as such, are binding to a certain extent on the government, and, universally, on the citizens or subjects. The law of nations imposes on every neutral individual certain duties of positive obligation, and provides for every case of a violated duty an adequate penalty. In each case, there is a distinct prohibition, guarded by an appropriate sanction, and it is the union of these that constitutes a perfect law. It is true, that a neutral government, except under the special provisions of a treaty, is not bound to restrain its subjects from engaging in a trade prohibited by the law of nations, nor have the courts of justice in a neutral country any power to enforce the penalties to which neutral individuals may be subject, From manifest reasons of general convenience, and public policy, the protection of their own rights is left to the belligerent powers, and it is to the tribunals which they establish, that the administration of penal justice, where their rights are violated, is exclusively entrusted. But, it is not by their own laws that the rights of the belligerents are defined, or that the nature and amount of the penalty, that follows a violation of their rights, are fixed ; nor are the tribunals which they appoint, although sitting in a belligerent country, local in their character or jurisdiction. The law that they administer is a general law, that embraces the neutral country as well as the belligerent, and it is the rights of the neutral, as well as of the belligerent, that they are bound to protect. Hence, it is difficult to admit, that this distribution of judicial power, which is itself a part of the law of nations, can at all affect the question, whether a civil court, in which the authority of that law is admitted, can, with propriety, enforce a contract founded on its violation. The distribution of judicial powers in

the United States, furnishes a perfect analogy. The state tribunals have no right to punish offences against the revenue laws of the Union. The penal administration of these laws belongs exclusively to the courts of the United States; yet where a contract, founded on a violation of these laws, is sought to be enforced in a state tribunal, it is the duty of the court to pronounce its nullity. The foundations of this duty are, that the authority of the law is admitted by the court, and that its provisions were obligatory on the parties to the contract, and these reasons equally apply to every contract that is meant to protect or encourage a breach of international law. The relation that subsists between the law of nations and the respective countries that admit its authority, is precisely analogous to that which subsists between the laws of the United States, and the several States of the Union. In both cases, communities, otherwise distinct and independent, are bound together by a general law, so far as the provisions of that law extend. The general law that binds together the smaller confederacy of the States of the Union, is the Constitution of the United States, and the statutes enacted under it. That which, for limited purposes, unites the grand confederacy of civilized nations, the law of nations.

§ 23. It has been alleged, that the conduct of a neutral, who engages in a trade that, by the law of nations, subjects his property to capture and confiscation is not illegal; that he has a perfect and lawful right to engage in the trade, and the belligerent, a right equally perfect and lawful, to seize and confiscate the property so employed. But the grounds on which this allegation is made, are not

easy to be discerned. It is, indeed, supported to some extent by the vague language of Vattel;(a) but the observations of this not very accurate or profound writer, will be found, when examined, to be inconsistent and self-contradictory.(b) While he affirms that a neutral merchant may lawfully prosecute a trade with the belligerent country in articles contraband of war, he admits that a nation at war, from a regard to its own welfare and safety, has an absolute right to seize and confiscate all supplies of this nature destined to the use of its enemies; yet he overlooks the inevitable consequence, that if these proceedings of the belligerent are necessary measures of self defence, the conduct of the neutral, in furnishing the warlike supplies, is, in its nature, an act of positive, though indirect hostility; that it is, therefore, a plain violation of neutral duty, and that it is the illegality of the trade, as involving this offence, that can alone justify the penalty by which it is sought to be restrained. Were the trade lawful, although the belligerent might be allowed from a regard to his own safety, to intercept warlike supplies, destined to the use of his enemy, he would be bound to pay their value and satisfy their freight, for thus the

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(a) Vattel, lib. 3, ch. 7, § 111, 112, 113.

(b) In speaking thus of Vattel, I shelter myself under the authority of Sir James Mackintosh, who says of this writer, in the text of his celebrated discourse, that "he only considers one part of this extensive subject, (i. e. the law of nature and nations,) namely, the law of nations, strictly so called, and I cannot help thinking, that, even in this department of the science, he has adopted some doubtful and dangerous principles." He adds in a note, "I might have justified more decisive censure by the authority of the greatest lawyers of the present age. His politics are fundamentally erroneous, his declamations are often insipid and impertinent, and he has fallen into great mistakes in important practical discussions of public law."—*Discourse on the Study of the Law of Nature and Nations*, Boston edition, pp. 76, 77.

injury to himself would be prevented, and the rights of the neutral be preserved. In confiscating the goods and the freight, and, in some cases, the ship, the belligerent treats the neutral owners as enemies; and, unless, on principle, he has the right to consider them as such, their own government would be bound to listen to their complaints, and redress their wrongs. Unless they are rightfully treated as enemies, the condemnation of their property, instead of being lawful, would be an act of violence and a cause of war. I am not aware that the observations of Vattel are sustained by any other writer on public law, and a single remark of Sir William Scott, that has already been given, contains, in itself, a full reply. It is found in his observation, that *there are no conflicting rights between nations at peace*; and this observation, although applied by him to the single case of a resistance to search, may be applied, with equal truth, to every case of a violation of neutral duty. A conflict of rights is either war in itself, or must necessarily lead to war, since where equal rights are opposed, the parties must be equally justified in resorting to force to defend and maintain them. If a trade, by the neutral, in articles contraband of war, is just as lawful, as the seizure and confiscation of the goods by the belligerent, the neutral must have the same right to defend his property by force, as the belligerent to employ force to effect a seizure. The duty of submission on the part of the neutral, necessarily implies a paramount right on the part of the belligerent. By the general consent of jurists, it is a universal truth, that, except as between nations at war, right and obligation are correlative terms. In all other cases, the existence of

a right implies a corresponding duty. Hence, to speak of the lawful right of the belligerent to interrupt and destroy a lawful trade of the neutral—the lawful trade of a friendly power—is a contradiction in terms. One of the positions must be false. It is the illegality of the trade that can alone justify its interruption. It is the misconduct of the neutral—his violation of duty and of law—that alone subjects him to a penalty. It is true, there is a single case—the transportation of enemies' property—in which a neutral ship is liable to be detained, although the trade in which it is employed is admitted to be lawful; but in this case, on the very ground that the trade *is innocent and lawful*, the neutral is subject to no penalty; but, on the contrary, receives from the captors the same freight that the enemy would have been bound to pay. There is here no conflict of rights; but those of the neutral are fully sustained and preserved, by considering the delivery of the goods to the captors, as equivalent to their delivery to the consignee.(a)

§ 24. The assertion that the trade of the neutral in articles contraband of war, the example which I select for illustration, is entirely lawful, evidently means, that it implies no violation of moral duty in those by whom it is prosecuted. As it is admitted that the property, so employed, is subject to the legal penalty of confiscation, the meaning must be, that where the neutral merchant is willing to incur this risk, he may engage in the trade with an entire security of conscience. In other words, that the sole object of the law, which provides the penalty, is, to protect the interests of the bellige-

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(a) Vide *supra*, Lec. V. § 47, p. 531.

rents, not to impose an obligation on the neutral. It is in these positions, I apprehend, that the radical vice of the argument consists. If an error has been committed, they are its source. They imply that the rules that prescribe and define the duties of neutrality, have their sole origin in a law or usage, that is purely conventional and arbitrary; yet, so great is the error, that it is the opposite doctrine that is emphatically true. There is an antecedent justice and morality, in which the foundation of these rules is deeply laid, and it is only because reason had discovered them to be rules of justice, that they are adopted in the usage of nations, as rules of law. Should a neutral government, without cause or provocation, complaint or warning, attack the possessions, or capture the ships of a belligerent power, all would denounce the aggression as a flagrant outrage on the laws of justice, as well as of humanity; yet it is precisely of this violation of justice, although in a milder form, that a neutral government is guilty, that, while it affects to maintain the relations of friendship, with contending belligerent powers, furnishes to one effectual aid, in the prosecution of the war, by a supply of ships, or arms, or munitions of war. With whatever pretext the government may veil its conduct, its acts are those of an unprovoked and causeless, and, therefore, unjust hostility. Now the duties that the law of nations imposes on the neutral merchant, flow exactly from the same principle as those that attach on the neutral government. Where he supplies to the enemy munitions or other articles contraband of war, or relieves with provisions, or otherwise, a blockaded port, although his motives may be different, his moral delinquency is precisely the same.

By these acts, he makes himself personally a party to a war, in which, as a neutral, he had no right to engage, and his property is justly treated as that of an enemy. In few words, the observance of that impartiality, which the law of nations enjoins on neutrals, is a high moral duty, not only in the instances that have been given, but in all in which it is exacted. The rules that define the cases, in which this impartiality must be shown, ought either to be expunged from the code of international law, or they demand our unreserved obedience, an obedience not merely in the act, but of the will and conscience. If these rules are just in themselves, and, with a few exceptions, their justice has never been doubted, where there is a knowledge of the facts and of the law, there can be no such thing as an *innocent* violation.

§ 25. It appears, from recent decisions in the courts of common law, in England, that the doctrine I have stated, has been there explicitly recognized. It has been, in effect, determined, in the cases to which I refer, that an insurance, made in a neutral country, on a neutral ship, where the voyage is undertaken with the intention of violating a blockade, is illegal and void, on the sole ground of the illegality of the voyage.<sup>(a)</sup> The only illegality, in this case, is created by the law of nations, and there seems to be no reason why the principle of these decisions is not applicable to every case, where the property insured is justly liable to belligerent capture, at the inception of the voyage; to every case, where the *delictum*, that is a substantive

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(a) *Harratt v. Wise*, (9 B. & Cress. 712.) *Naylor v. Taylor*, (1b. 715.) *Medeiros v. Hill*, (8 Bing. 231.) Vide Note III.



cause of condemnation, exists, when the policy attaches.

It is proper to add, that it was held by the Court of King's Bench, in one of the cases to which I refer, that the doctrine of a constructive knowledge of a blockade, is not applicable to the case of an insurance in a neutral country; that the rule which declares that, in some cases, the knowledge of the party is a presumption of law, which he is not permitted to repel, is designed solely to protect the interests of the belligerent; and although it may, with propriety, be enforced in a court of admiralty, might be productive of great injustice, if adopted as a rule, in the law of insurance; that, as between the merchant and the insurer, the knowledge of a blockade that, if justly imputed to the former, would render the voyage illegal, is a question of fact for the decision and judgment of a jury, and, like other facts, must be established, by the party who alleges it, to the satisfaction of a jury, by direct or probable evidence.<sup>(a)</sup> This distinction, which secures an indemnity to a party really innocent, seems highly reasonable, and is, doubtless, to be applied to every case where the neutral property insured is liable to be condemned, on the sole ground of the *presumed* knowledge or intention of the owner. Hence, there are many cases in which a policy may be sustained, if effected in a neutral country, that would be certainly void, if made in the belligerent country, in which the property insured would be liable to condemnation.

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(a) *Harratt v. Wise*, ut supra. The same rule was adopted by the Court of King's Bench in Ireland, in the case of *Rhodes v. Hunter*, (2 *Hud. and Brook.*, 581.) The insurance in this case was effected by a different policy, but related to the same vessel and voyage.

§ 26. The doctrine that seems to prevail in the United States, in relation to an insurance on articles contraband of war, is not easy to be reconciled with the principle, on which the English decisions, relative to a blockade, appear to be founded. It has been determined by the Supreme Court, in each of the States of New-York and Massachusetts, that such an insurance made in a neutral country is effectual and valid; and this expressly on the ground that the law of nations does not declare the trade of the neutral in contraband articles to be unlawful. The early decisions in New-York proceeded to the length of declaring, that the insurer is bound by the policy, even where he was ignorant, when it was effected, of the true nature and quality of the cargo; but that, in this respect, they were erroneous, although they have not hitherto been explicitly overruled, is now universally admitted.(a) It was held, in Massachusetts, that the insurer never assumes the risk of contraband, unless the quality of the cargo is known or disclosed to him; but that the concealment of the risk does not operate to avoid the policy, but merely to discharge the insurer from any loss that the risk may occasion.(b) The learned judge who delivered in this case the opinion of the court, was very far from founding their judgment on reasons peculiar to a trade, in articles contraband of war. On the contrary, he laid down the broad and general position, that a neutral merchant is not obliged, in any case, to re-

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(a) *Seaton v. Low*, (1 *Johns. Cases*, 1.) *Juhel v. Rhineland*, (3 *Id.* 120, 487.) Chancellor Kent says, that the principle of these cases does not appear to be sound, and that their authority may now be considered as overruled, (3 *Kent's Comment.* 5th ed. p. 268.)

(b) *Richardson v. Marine Ins. Co.*, (6 *Mass.* 102.)

gard the state of war between other nations ; evidently meaning, that the merchant may rightfully continue to prosecute his trade, as if no such war existed ; that to him, every trade that is lawful in peace, is lawful in war. Thus, the doctrine of the court embraces not only the transportation of contraband, but every case in which the property of the neutral merchant may become liable to belligerent capture, such as the meditated or actual breach of a blockade, a conveyance of military persons, and even the employment of his ship as a transport in the enemy's service.

The decisions in New-York and in Massachusetts, although evidence of the law in the particular states, and entitled to high respect from the character of the judges by whom they were pronounced, are not to be regarded as having settled the law of the United States. No similar decision has yet been made in the Supreme Court of the United States, the paramount authority on all questions of general commercial law. It must, however, be confessed, that the language of Mr. J. Story, in an important case, in which he delivered the opinion of the court, appears to sustain the Massachusetts doctrine in all its extent ;(a) but as the observations of the learned judge, may bear a different interpretation, and the precise question of the validity of an insurance on contraband goods, was not that, which the court was called to determine, the judgment they pronounced, cannot properly be regarded as a definitive authority. So far as the courts of the United States are concerned, the general question of the legality of an insurance on

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(a) *The Santissima Trinidad*, (7 *Wheat.* 283.)

a trade prohibited by the law of nations, is still open for consideration and decision.

§ 27. No decisions are to be found in the English reports as to the validity of an insurance on contraband articles, where the policy is effected in a neutral country ; but the cases in New-York and in Massachusetts, if limited in their application to such a trade, it must be admitted, entirely correspond with the general law of continental Europe. It is stated by Benecke, that the general law of insurance permits an insurance to be made in a neutral country on goods contraband of war, although destined to the immediate use of a belligerent power ; and the provisions of many of the foreign ordinances appear to confirm the truth of this statement. Thus the maritime code of Prussia, while it forbids an insurance on munitions of war, or other contraband articles, where they belong to the enemy, or are destined to his use, permits, by implication, a similar insurance, where the goods are destined to a belligerent country, in a war in which Prussia herself is neutral. By the Ordinances of Hamburg, of Amsterdam, and of Sweden, such insurances are expressly authorized, although the insurer is held not to be liable for a loss that the risk may occasion, unless the contraband articles are enumerated, or at least described in the policy.(a)

The law of Italy, we have the testimony of Baldasseroni, is in conformity to the provisions of these ordinances.(b) But the language of Emerigon leaves us doubtful, as to the existing state of

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(a) 1 Benecke, 43, 44. Ib. 334—339. Ordinance of Prussia, § 1959, 1960. Ordinance of Amsterdam, Art. 10 ; of Sweden, Art. 5, § 3 ; of Hamburg, Art. 10, tit. 5.

(b) Baldasseroni, *Del Assecur Marit*, tom. 1, parte 3, tit. 4, p. 274.

the law of France. He states, as a general rule, that insurances on the trade of neutrals, with a country engaged in war, are valid, unless there has been a fraudulent concealment, or the trade is prohibited by the law of nations, or the provisions of a treaty. But he adds, that an insurer is bound by a policy, on goods shipped in the name of a neutral, even where the true owner is a belligerent subject, and false papers are used to disguise the fact, provided the real nature of the transaction has been disclosed to him; yet we have seen that the use of false papers for such a purpose, is prohibited by the law of nations, and is a substantive cause of condemnation. It is probable, however, that in this passage, Emerigon refers solely to an insurance made in France, as a belligerent country, and on French property. In such a case, the French owner is the party really assured, and his resort to a neutral cover of his property, would not, certainly, be a ground for annulling his policy in a French tribunal.(a)

On a review of the whole evidence, it seems a probable conclusion, that, even admitting as a general principle, that an insurance in a neutral country, on a voyage or trade prohibited by the law of nations, is to be considered as illegal and void, a policy on articles, contraband of war, must be regarded as an exception. We may believe that this exception is merely arbitrary, yet hold that the general usage of commercial nations is sufficient evidence of the existing law. As there is no evidence, however, of a similar usage in regard to

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(a) 1 Emerigon, ch. 8, § 5, p. 212; ch. 12, § 20, p. 460.

other cases, that the general principle I have stated would embrace, it is on the grounds of reason and analogy, that such cases, when they arise, may properly be determined.

§ 28. If the doctrine shall be finally established, that no insurance, made in a neutral country, is to be deemed invalid, merely on the ground that the voyage or trade, to which it relates, is prohibited by the law of nations, there are only two cases in which such an insurance can be void. First, where the neutral government is bound by the special provisions of a treaty to restrain its subjects from engaging in the trade to which the policy relates ; and secondly, where the trade is prohibited by a municipal law.

The effect of a treaty in rendering void an insurance on a voyage or trade, in contravention of its provisions, has already been stated. We have seen, that by the general law of nations, and certainly under the Constitution of the United States, the stipulations of the treaty are obligatory, not only upon the government, but individually on its subjects or citizens.(a) On this subject, no further observations seem to be requisite.

In the United States an act of Congress was passed in 1794, and revised and re-enacted in 1818, that among other prohibitory enactments, declares it to be a misdemeanor for any person, within the jurisdiction of the United States, to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service, against a nation at peace with the United States, and subjects to forfeiture the vessel so fitted out. An insurance in

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(a) *Supra*, Lec. III. § 38, pp. 349, 350. Note VIII. p. 399.

any of the States of the Union, on a vessel thus illegally equipped or fitted out, her armament, furniture, and any goods that might be taken on board, would be certainly void. In England there is an act of parliament (5 *Geo.* III. ch. 69) entitled, "An act to prevent the enlisting or engaging of his majesty's subjects to serve in foreign service, and the fitting out or equipping in his majesty's dominions, vessels for warlike purposes without his majesty's license"—that from the resemblance of its provisions, was, doubtless, suggested by the prior law of the American Congress. I shall close with a few words that have a reference to the general question already discussed. It will scarcely be pretended, that the acts which are prohibited in the laws that I have cited, were lawful in themselves before these statutes were passed. They were already prohibited by the law of nations, and were subject to severe penalties to which those in the statutes are merely cumulative. It is difficult to believe, that were no such laws in force, a court of justice in Great Britain, or in the United States, would sustain a policy of insurance on an armed vessel, fitted out in a domestic port, for the express purpose of cruising under a foreign commission, against the commerce of a friendly power; yet, if such an insurance would be void, it can only be so on a principle that would include every case, where the property of a neutral, on the ground of a violation of neutrality, would be subject to belligerent capture. The same illegality that would avoid a policy in the one case, exists in them all.

## PROOFS AND ILLUSTRATIONS.

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### NOTE I.

P. 725, § 10. The object of this note is to sustain more fully, by a reference to authorities, the following positions in the text: 1. That the rule was not enforced in any form by the English admiralty, prior to 1756. 2. That, as then enforced, it was founded on a different principle from that subsequently adopted. 3. That, during and after the American war, it was explicitly abandoned and overruled by the Lords of Appeal, and by the House of Lords.

1. On the first point, it is sufficient to say, that if any cases were to be found in the records of the English admiralty prior to 1756, of the condemnation of neutral ships or their cargoes, on the sole ground of their being engaged in the colonial trade of the enemy, they would certainly have been produced; but in the multiplied discussions to which the controversy has given rise, none such have been alleged. On the other hand, there is positive evidence that in the war of 1744, the trade of neutrals with the colonies of the enemy, France—was held to be lawful, since neutral ships taken on such voyages, were released by the Lords of Appeal. In the case of the *Providentia*, this fact is stated by the counsel for the claimants, Drs. Arnold and Lawrence—and is not denied by the opposite counsel or by the court. (2 *Rob.* 146.)

2. That, in the war of 1756, neutral ships engaged in the colonial trade of the enemy, which had not been opened by any general regulations, were condemned on the ground that by virtue of their employment, they became the adopted or naturalized vessels of the enemy.

In the case of the *America*, a Dutch ship, bound from St. Domingo to Holland, with colonial produce, the reason for



condemnation in the printed case was, that "the ship must be looked upon as a *French* ship, for, by the laws of France, no foreign ship can trade in the French West Indies."

In the case of the *Snip*, the reasons assigned by Sir G. Hays and Mr. Pratt, (afterwards Lord Camden,) the counsel for the captors, before the Lords of Appeal, were—"For that the ship, being employed in carrying provisions to and from a French colony became thereby a French ship, and as such was justly condemned." (1 *Wheat. Append.* p. 515.)

In the case of *Berens v. Rucker*, (1 *W. Black.* 313,) in which a question arose whether a ship, with French colonial produce on board, was, on that ground alone, liable to be captured, Lord Mansfield said, "The rule is, that, if a neutral ship trade to a French colony *with all the privileges of a French ship, and is thus adopted and naturalized*, it must be looked upon as a *French* ship, and is liable to be taken; not so, if she have only French produce on board without taking it in at a French port." Lord Mansfield, who was appointed Lord Chief Justice in 1756, was himself one of the Lords of Appeal during that war, it is known, frequently assisted in their decisions, and could not possibly have been ignorant of the principle on which they were founded. *Berens v. Rucker* was decided in 1761. Blackstone (3 *Com.* 70) says, that, "the commission of appeals, during the war of 1756, was regularly attended, and all the *decisions conducted* by a judge, whose masterly acquaintance with the law of nations was known and revered by every nation in Europe." That in this passage he refers to Lord Mansfield has never been doubted.

In the case of *Brymer v. Atkyns*, (2 *H. Black.* 191,) Lord Loughborough states the principle of the rule as enforced in 1756, in terms that, in their meaning, exactly correspond with those of Lord Mansfield. He says, that neutral ships were condemned, as *adopted French*.

It is true, that there are some passages in Mr. Jenkinson's celebrated "Discourse on the Conduct of Great Britain in respect to Neutral Nations," published in 1757, which seem to show that the exclusion of neutrals, from the colonial and coasting trade of the enemy, was then enforced, exactly on the same grounds that were subsequently assumed by Sir Wm. Scott; but it is only when detached from the con-

text, that these passages can bear this interpretation ; on an examination of the Discourse, it will be seen, that they have no reference whatever to a trade conducted by neutrals on their own account, but refer solely to a carrying trade, between the ports of the enemy, of enemies' property. During the war of 1756, the Dutch claimed not only the right of engaging in the carrying trade of France, from which they were wholly excluded in time of peace, but of protecting, by their flag, the effects and property of the enemy ; and the sole object of Mr. Jenkinson's Discourse was to refute their pretensions by showing, first :—That the capture of enemy's property in neutral ships was justified by the law of nations ; and next, that the Dutch were not exempted from the rule, by any provisions in the subsisting treaties between Holland and Great Britain. In the beginning of the Discourse, he makes, in express terms, this division of his subject. In fact, the Discourse of Mr. Jenkinson, so far from giving any support to the opposite argument, contains a distinct and full admission of the general right of neutrals to engage in any trade with the enemy, with their own merchandise, and on their own account, with the single exception of a trade in contraband of war. He says—"It cannot, I think, be doubted, that, according to those principles of natural equity, that constitute the law of nations, the people of every country must always have a right to trade in general with the ports of every state, although engaged in war with another, *provided it be with their own merchandise, and on their own account*, and that under this pretence, they do not attempt to screen from one party the effects of the other ;" and he then adds the exception of contraband, (*Dis.* p. 21.) It seems a fair inference from this passage, that when the discourse was written, there had been no condemnation of neutral ships engaged in the colonial trade, even on the ground of their *adoption* by the enemy. It is probable, that the rule was not enforced until a subsequent period of the war.

3. That during the American war, and subsequent to the peace that followed it, the rule of 1756, was explicitly abandoned, and overruled both by the Lords of Appeal and by the House of Lords. The following statement of the cases

before the Lords of Appeal, is extracted from the memorial of the merchants of Baltimore, written by Mr. Pinckney :

"The question first came before the Lords of Appeal, in January, 1782, in the Danish cases of the *Tiger*, *Copenhagen*, and others, captured in October, 1780, and condemned at St. Kitts, in December following. The grounds on which the captors relied for condemnation, in the *Tiger*, as set forth at the end of the respondent's printed case, were, "for that the ship having been trading to Cape François, where none but French ships are allowed to carry on any traffic, and having been laden at the time of the capture, with the produce of the French part of the island of St. Domingo, put on board at Cape François, and both ship and cargo taken confessedly coming from thence, must, (pursuant to precedents in the like cases in the last war,) to all intents and purposes, be deemed a ship and goods belonging to the French, or at least adopted and naturalized as such."

"In the *Copenhagen*, the captor's reasons are thus given ;

"1st. Because it is allowed that the ship was destined, with her cargo, to the island of *Guadaloupe*, and no other place.

"2dly. Because it is contrary to the established rule of general law, to admit any neutral ship to go to, and trade at, a port belonging to a colony of the enemy, to which such neutral ship could not have freely traded in time of peace."

On the 22d of January, 1782, these causes came on for hearing before the Lords of Appeal, who decreed *restitution* in all of them : thus, in the most solemn and explicit manner, disavowing and rejecting the pretended rules of the law of nations, upon which the captors relied ; the first of which was literally borrowed from the doctrine of the war of 1756, and the last of which is that very rule on which Great Britain now relies.

It is true, that, in these cases, the judgment of the Lords, was pronounced upon one shape only of the colony trade of France, as carried on by neutrals ; that is to say, a trade between the colony of France and that of the country of the neutral shipper. But, as no distinction was supposed to exist, in point of principle, between the different modifications of the trade, and as the judgment went upon general grounds applicable to the entire subject, we shall not be thought to overrate its effect and extent, when we represent it as a complete rejection, both of the doctrine of

the seven years' war, and of that modern principle, by which it has been attempted to replace it. But, at any rate, the subsequent decree of the same high tribunal, did go that length. Without enumerating the cases, of various descriptions, involving the legality of the trade in all its modes, which were formally adjudged by the Lords of Appeal, after the American peace, it will be sufficient to mention the case of the *Vervagting*, decided by them in 1785 and 1786. This was the case of a Danish ship, laden with a cargo of dry-goods and provisions, with which she was bound on a voyage from Marseilles to Martinique and Cape François, where she was to take in, for Europe, a return cargo of West India produce. The ship was not proceeded against; but the cargo, which was claimed for merchants of Ostend, was condemned as enemy's property, (as in truth it was,) by the Vice-Admiralty of Antigua, subject to the payment of freight, *pro rata itineris*, or, rather, for the whole of the outward voyage. On appeal, as to the cargo, the Lords of Appeal, on the 8th of March, 1785, reversed the condemnation, and ordered further proof of the property to be produced within three months. On the 28th of March, 1786, no further proof having been exhibited, the proctor for the claimants, declaring that he should exhibit none, the Lords condemned the cargo, and, on the same day, reversed the decree below giving freight, *pro rata itineris*, from which the neutral master had appealed, and decreed freight generally, and the costs of the appeal.

"It is impossible that a judicial opinion could go more conclusively to the whole question on the colony trade than this; for it not only disavows the pretended illegality of neutral interpositions in that trade, even directly between France and her colonies; (the most exceptionable form, it is said, in which that interposition could present itself;) it not only denies, that property engaged in such a trade, is, on that account, liable to confiscation, (inasmuch as, after having reversed the condemnation of the cargo pronounced below, it proceeds afterwards to condemn it, merely *for want of further proof as to the property*,) but it holds that the trade is so unquestionably lawful to neutrals, as not even to put in jeopardy the claim to freight for that part of the

voyage which had not yet begun, and which the party had not yet put himself in a situation to begin."

In the case of the *Emanuel*, (1 Rob. 299, 300,) Sir William Scott attempts to get rid of the authority of these decisions by the following explanation of the grounds on which they were rested. "It is certainly true," he said, "that in the American war, many decisions took place which then pronounced that such a trade between France and her colonies was not considered as an unneutral commerce; but under what circumstances? It was understood that France, in opening her colonies during the war, declared that this was not done with a temporary view, relative to the war, but on a general permanent purpose of altering her colonial system, and of admitting foreign vessels universally and at all times, to a participation of that commerce; taking that to be the fact, (however suspicious its commencement might be, during the actual existence of a war,) there was no ground to say, that neutrals were not carrying on a commerce as ordinary as any other in which they could be engaged; and, therefore, in the case of the *Vervagting*, and in many other succeeding cases, the Lords decreed payment of freight to the neutral ship-owner. It is fit to be remembered, on this occasion, that the conduct of France evinced how little dependence can be placed upon explanations of measures adopted during the pressure of war; for hardly was the ratification of the peace signed when she returned to her ancient system of colonial monopoly."

To these observations of the learned judge, the reply of Mr. Pinckney seems conclusive, that to refer the decision of the Lords in the *Vervagting* and other cases to the reason thus assigned, is to accuse that high tribunal of acting upon a confidence in a declaration incredible in itself, and sustained by no proof, after its utter falsehood had been notoriously and unequivocally ascertained. The *Vervagting* was decided by the Lords in 1785 and 1786, at least two years after France "had returned to her ancient system of colonial monopoly." When, therefore, the decision was made, the supposed declaration of an intended permanent abandonment of that monopoly was *known to be false*, and could not therefore have been permitted to produce any legal consequences.

The last case to be cited is that of the *Katharina*, which was determined by the House of Lords, in 1783. (5 *Brown's P. C.*, Tomlyn's ed. p. 328.) It was the case of a Dutch ship taken on a voyage to Amsterdam, from a French colony with a cargo of colonial produce on board. Both ship and cargo had been condemned as lawful prize by the Judge Admiral in Scotland; his sentence had been affirmed by the Court of Sessions, and the claimants then appealed to the House of Lords, who reversed the decisions of the courts below, and ordered the value of the ship and cargo to be paid to the claimants. As to the ground of this reversal, there seems to be no doubt. It is expressly stated by the reporter to have been "that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade at, or coming from the French West India Islands, with cargoes purchased there, are liable to capture;" and the truth of this statement is rendered evident by a reference to the arguments of the counsel. The counsel for the captors placed their demand of condemnation on the rule of 1756, which they stated in these words: "That the subjects of all other nations being absolutely prohibited by the fundamental laws of France, to trade to or from the French West India Islands, the ship in question, coming directly from St. Domingo, with a cargo taken in there, be the property what it may, must be considered as French, and as such, both ship and cargo were lawful prize agreeable to many decisions in the courts of Admiralty, and by the Lords of Appeal, in the last war, founded on the clearest principles."<sup>(a)</sup> And to this the counsel for the claimants replied that the rule in question, had been abandoned, and the legality of such a trade, when conducted by neutrals on their own account, established by many recent decisions of the Lords Commissioners of Appeal in *The Tiger*, *The Copenhagen*, and other cases.<sup>(b)</sup>

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(a) Several of these decisions are referred to in the margin, and the earliest of them are in 1760, which seems to confirm my conjecture, that none such had been pronounced when Mr. Jenkinson published his discourse.

(b) Sir C. Robinson has made some comments on the decision in this case, that I have not deemed it necessary to notice, since his observations are, in a great measure, conjectural; and if admitted to be true, do

It is proper to observe, in conclusion, that for most of the authorities that have been cited, I am indebted to a very able essay of Mr. Wheaton, published as a note, in the Appendix to the first volume of his reports, (1 *Wheat. R.* 507,) and that Chancellor Kent, in referring to this note, admits it to have proved that the rule "stood upon loose grounds of official authority."

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NOTE II.

P. 731, § 14. The *Nereide*, (9 *Cranch*, 388, *opinion of Mr. J. Story*, pp. 440, 441.) In support of his opinion, Mr. J. Story refers to the cases, then recent, of American ships captured while under British convoy by the Danes, which were condemned by the highest tribunal of prize in Denmark. The sentence of this tribunal was expressly affirmed by the Danish sovereign, after an earnest appeal made to him by the government of the United States; and the Danish minister affirmed that none of the powers of Europe had ever called in question the justice of the principle on which the condemnation was founded. Mr. J. Story also states, that in the case of the *Sampson Barney*, to which I have before referred, he had been informed, by respectable authority, that no proof of an actual resistance was made on the final hearing; and he also shows, in a note, that the judgment of condemnation in the court below was affirmed by the Lords of Appeal. If so, the sole ground of condemnation must have been that the neutral ship was sailing under belligerent convoy. (9 *Cranch*, pp. 442, 443.) Whatever may have been the ground of the final decision of the Lords in the *Sampson Barney*, there is a subsequent decision by Sir William Scott, that leaves no doubt as to the principles by which he himself was governed. (*The Fanny*, 1 *Dod.* 443.) This case was nearly cotemporaneous with *The Nereide*, and involved substantially the same question; but the doctrine held by the learned judge was directly contrary to that of the United States' Supreme Court. He decreed salvage for the recap-

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not seem to me to affect the principle of the decision. They have, however, been fully replied to, by Mr. Wheaton. (1 *Wheat. App.* p. 525.)

ture of neutral property that had been previously taken by an American cruiser from on board an armed British vessel, upon the ground, that the American prize courts would probably, and might justly, have condemned the property. He observed that the case of a merchant who puts his goods on board a ship of force, which he has every reason to believe will be defended by that force, is very different from that of a person who puts his goods on board a mere merchant vessel. In the latter case the intention to resist belligerent visitation and search, cannot justly be imputed; but in the former, the very nature of the act betrays and evinces the existence of that intention. The neutral who acts upon such an intention so far adheres to the belligerent. He withdraws himself from his protection of neutrality, and resorts to another mode of defence. The learned judge closed his opinion with this decisive remark: "I take it to be quite clear, that if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy." The Supreme Court of the United States, however, in a subsequent case in which the same question of the legality of a shipment on board an armed ship of the enemy arose, was unmoved by the authority and the reasoning of Sir William Scott, and adhered firmly to its former decision. (*The Atalanta*, 3 *Wheat.* 409.) In this case Mr. J. Johnson delivered an elaborate opinion in vindication of the decision of the court; but I confess my doubts whether its attentive perusal will produce any change in the conviction that the arguments of Sir William Scott and Mr. J. Story are fitted to impress.

It is proper to add, that the claims on the Danish government, for the condemnation of the American ships, to which I have referred, in the beginning of this note, were not abandoned in consequence of the first peremptory refusal of that government to admit their justice. When Mr. Wheaton was appointed minister to Denmark, the negotiation for the settlement of these claims was renewed, and was conducted by him with such signal ability, that it finally resulted in the signature of a treaty in 1836, between the United States and Denmark, by which the latter power stipulated to indemnify the American claimants generally, for the seizure of their



property, by the payment in gross of a fixed sum, leaving it to the American government to apportion it among the claimants. This convention, however, closes with a declaration, that as its only object is to terminate all the claims, "it can never hereafter be invoked by one party or the other as a precedent or rule for the future." Hence the Danish government, although it settled the claims, was far from admitting the injustice of the rule upon which it had originally acted. The reader will find the history of this negotiation, and a condensed statement of the arguments of the skilful negotiator in 2 *Wharton's International Law*, 260-278.

### NOTE III.

P. 755, § 25. *Harratt v. Wise*, (9 B. & Cress. 712.) This was an action on a policy of insurance on goods by the ship *Ann*. It appeared in evidence that the ship sailed from Liverpool on the 4th of February, 1826, and was forced, by stress of weather, to put into Lochindale, one of the Western isles of Scotland, sailed thence on the 12th of March, arrived off Monte Video in May, and was there taken by the Brazilian squadron stationed for the blockade of Buenos Ayres. On the part of the defendants, it was proved that the blockade of Buenos Ayres by the Emperor of Brazil, was notified in the London Gazette, on the 18th of February, and it was insisted that this notification was conclusive evidence that the master knew of the existence of a blockade before he sailed from Scotland; but Lord Tenterden left the question, whether the master was so informed of the blockade, as a question of fact to the jury. The jury found that the master was not so informed, and gave their verdict for the plaintiff.

Lord Tenterden, Ch. J., in delivering the judgment of the court, discharging the rule for a new trial, (*inter alia*,) said, "At the trial it was contended, on the behalf of the defendant, and again, on moving for a new trial, that the voyage, being to a blockaded port, was an illegal voyage, and the policy void. We think it cannot be said that this voyage was illegal in its commencement, because the voyage began by the ship's] departure from Liverpool, which was before the publication of the Gazette. And although the blockading nation may, by the law of nations, be allowed to

consider its notification of a blockade, as notice thereof to all the subjects of the nation to which the notification has been made, for it cannot be expected that the blockading nation should be able or required to prove actual knowledge in the master of every vessel of the other country, yet such a rule, allowing it to prevail to the supposed extent, (though it appears, probably, to be open to some qualification and relaxation for the furtherance of justice and the benefit of commerce,) cannot, in our opinion, be applied to the case of insurance. And if the possibility, or even probability, of actual knowledge, should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We, therefore, think that such a rule cannot be established as a rule of insurance law; but that knowledge, like other matters, must become a question of fact for the decision and judgment of a jury. The probability of actual knowledge, upon consideration of time, place, the opportunities of testimony, and other circumstances, may, in some instances, be so strong and cogent, as to cast the proof of ignorance on the other side in the opinion of the jury, and, in the absence of such proof of ignorance, to lead them to infer knowledge; but still we think the inference properly belongs to them. In the case now before the court, if the jury had drawn the inference, we are not prepared to say they would have done wrong; neither can we say that they did wrong in declining to draw that inference; and, therefore, we cannot set aside their verdict."

My observations on this case are: First. That if the jury had found that the master was informed of the blockade when he left Scotland, it is certain that the court would have given judgment for the defendants, on the sole ground that the subsequent voyage was illegal by the law of nations. Secondly. That it was no part of the defence that the existence of the blockade, if known to the master or his owners, was concealed from the underwriters, when the policy was effected. There is no mention in the case of such a concealment, and the facts in evidence gave no ground for the imputation. The only reason for imputing knowledge to the master or his owners, was the notification of the

blockade in the Gazette, and this afforded an equal presumption of the knowledge of the insurers.

*Naylor v. Taylor*, (9 B. & Cress. 718.) One of the questions that arose in this case, related to the same blockade as in the preceding. The vessel in which the goods insured were laden, sailed from Liverpool on a voyage to any port in the river Plate, with liberty, in the event of a blockade, to proceed to any other port, on the 11th of March, 1826, which was nearly a month after the blockade of the ports in the river Plate, belonging to the government of Buenos Ayres, had been notified in the London Gazette. It was, therefore, contended, on behalf of the defendant, that the voyage, being to a blockaded port, after notice of the blockade, was illegal. Lord Tenterden, Ch. J., in delivering the judgment of the court on this question, said: "We think there is no ground for saying that this voyage, as insured, was illegal in its commencement; indeed, according to the opinion of Lord Stowell, in the case of *The Shepherdess*, the vessel might have sailed for Buenos Ayres without contravening the law of nations, provided it was a part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at Monte Video, or of any of the Brazilian ships met in the river Plate, and the policy is framed upon a doubt, whether the blockade would continue at the time of the ship's arrival in the Plate, and does not indicate any intention to violate the blockade." It is plain, from this language of his lordship, that if, in the opinion of the court, the voyage insured had contravened the law of nations, this illegality would have been held sufficient to avoid the policy.

✓ *Medeiros v. Hill*, (8 Bing. 231.) The action in this case was not on a policy of insurance, but on a charter party, and one of the grounds of the defence was that the defendant, the ship owner, was not bound to execute the charter party by proceeding on the voyage therein described, because the port of destination was publicly and officially known to be under a blockade when the charter party was concluded. In other words, that the illegality of the voyage excused him from the performance of his contract. As the court, however, were of opinion that there was no ground

for presuming that the parties contemplated a violation of the blockade, they overruled the objection. Some of the observations of Tindal, C. J., who delivered the judgment of the court in this case, are well calculated to mislead an incautious reader; and to guard against the error they seem to involve, it is necessary first to transcribe them. "The case of *The Neptunus*, (2 Rob. 110,) establishes that it is illegal to attempt to enter a blockaded port, in violation of the blockade, and that, after notification of the blockade, the act of sailing to a blockaded port, with the intention of violating the blockade, is in itself illegal. But neither that case nor any other that can be cited, has laid it down, that the mere act of sailing to a port which is blockaded at the time the voyage is commenced, is any offence against the law of nations, where there is no premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives off the port. Any such determination would be destructive, in many instances, of the fair commercial speculations of neutral merchants, to whom it might be of the first importance to possess the opportunity of introducing their goods into the port which had been blockaded, at the very earliest moment after such blockade had been relaxed. Such an object appears to be legal, both from the opinions of Sir W. Scott in the case of *The Shepherdess*, (5 Rob. 264,) and from the judgment of Lord Tenterden, C. J., in *Naylor v. Taylor*, (9 B. & C. 718.)"

It would certainly be inferred from these remarks, that a neutral ship, even where she sails with a knowledge of the blockade, has the right to proceed for the purpose of inquiry to the very entrance of the blockaded port, which we have seen is directly contrary to the established rule of the admiralty, (*supra*, p. 668.) It is difficult to believe, however, that such could have been the meaning of the learned chief justice, since the rule that prescribes the duty of inquiry at an intermediate port is distinctly laid down in both the cases to which he refers; by Sir W. Scott in *The Shepherdess*, and by Lord Tenterden in *Naylor v. Taylor*.

